Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-235

I. M. MOLEVER; MODERN MARTS, INC., a Pennsylvania corporation; PITTSBURGH AND WEST VIRGINIA INVESTMENT COMPANY, a Pennsylvania corporation; BETTY BERNSTEIN, SHIRLEY Z. WEINBERGER, as custodian; DON D. BROOKS; and JEAN C. PARIS

Petitioners,

v.

STANLEY E. PREISER and JOHN F. BROWN

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

B. MICHAEL DANN
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July 12, 1979

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I. M. MOLEVER; MODERN MARTS, INC., a Pennsylvania corporation; PITTSBURGH AND WEST VIRGINIA INVESTMENT COMPANY, a Pennsylvania corporation; BETTY BERNSTEIN, SHIRLEY Z. WEINBERGER, as custodian; DON D. BROOKS; and JEAN C. PARIS
Petitioners,

v.

STANLEY E. PREISER and JOHN F. BROWN
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on March 8, 1979.

CITATIONS TO THE OPINIONS BELOW

The opinion of Judge Robert E. Maxwell granting defendants' motions to dismiss appears in Appendix

A, *infra*. It is unreported. The opinion of the Circuit Court of Appeals is unreported and appears in Appendix A, *infra*. A related opinion is published *sub nom* Molever v. Levenson, 539 F.2d 996 (4th Cir. 1976).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 8, 1979. A petition for rehearing was timely filed and denied by the Circuit Court of Appeals apparently on April 13, 1979, though the order is undated. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONS AND STATUTES INVOLVED

The federal constitutional provisions and statutes involved include the Seventh and Fourteenth Amendments to the Constitution, the Federal Rules of Civil Procedure, Rules 12(b)(6) and 56, and the Federal Rules of Evidence, Rules 201 and 605.

QUESTIONS PRESENTED

1) Whether a District Court may, in a legal malpractice action, circumvent the Seventh Amendment right to jury trial, the Federal Rules of Evidence and the Federal Rules of Civil Procedure by simply reviewing the record of prior proceedings in the same court, without request, notice or opportunity to be heard and then dismissing the malpractice action on the basis that, in the opinion of the District Court Judge, there was no malpractice.

2) Whether a District Court may properly use judicial notice as a vehicle to dismiss a legal malpractice

case where the matter noticed is the entire proceedings in a four week trial and appeal and where:

a.) no request for notice was made;

b.) the motions pending attacked only the sufficiency of the pleadings;

c.) the pleadings disclosed that major portions of the neglect alleged occurred outside of the record before the court;

d.) no reference was ever made as to what portions of the record were reviewed nor what portions demonstrated that no neglect existed; and

e.) the matter noticed was not a matter of fact, but of opinion.

3) Whether this Court will permit the creation of a "preferred" class of litigants—lawyers.

STATEMENT

In 1967, I. M. Molever and others ("Molever") sued Robert and Donald Levenson ("Levensons") for defamation.[1] The defamations (there were several) occurred when bank examiners discovered serious irregularities regarding a "floor plan" arrangement between the bank

[1] A total of three cases were actually filed by Molever and other stockholders of the Bank of Wheeling, W. Va.: an action under § 10(b) of the Securities and Exchange Act of 1934; a shareholder's derivative action; and a defamation action. For space and convenience, only the defamation action will be discussed, as representative of the issues; and only Molever will be referenced, as representative of the plaintiff petitioners. Other parties were joined as defendants, but dismissed prior to trial. These factual allegations are taken from the Circuit Court decisions, 539 F.2d 996 (4th Cir. 1976), which is found in Appendix A.

and the Levensons, and additional irregularities regarding certain loans authorized by an employee named Dennis. In essence, the Levensons (who were board members of the bank) accused Molever (who was the bank president) publicly and privately of criminal conduct in connection with these transactions though they knew that they, not Molever, had arranged and authorized the illegal floor plan arrangement, and knew that they, not Molever, were implicated in the Dennis loans and that Dennis had admitted fault in the loans and had absolved Molever of any knowledge or complicity.

After an interlocutory appeal and interminable delays, the matter was tried to a jury, resulting in verdicts in favor of Molever in excess of five million dollars. The jury held the Levensons liable on the fraudulent "floor plan" for over one million dollars. It held the Levensons liable on the "Dennis loans" for seven hundred thousand dollars. (These verdicts were based upon the derivative claims). The jury then awarded Molever over three million dollars in general and punitive damages against Levensons for the defamations.

As the result of a post trial motion for judgment N.O.V., the trial court set aside the jury verdict on the defamation claims, stating that the charges of criminal conduct were "privileged;" but entered judgment on the remaining claims. The Fourth Circuit affirmed the judgment N.O.V. and reversed the remaining judgments. *Molever* v. *Levenson,* 539 F.2d 996 (4th Cir. 1976). Certiorari was denied by this Court. 429 U.S. 1024, 97 S. Ct. 643, 50 L. Ed. 2d 625 (1976).[2]

[2] One claim was returned to the District Court for re-trial—the derivative claim regarding the Dennis line loans. Although that claim had been tried to a successful conclusion and was reversed for technical reasons, not on its merits, upon remand the District Court, on application of the Levensons, ordered Molever to post a one hundred thousand dollar bond for costs. Although advised that the plaintiffs' means did not permit of such a large bond, the District Court dismissed the cause upon failure to post the bond, and the Circuit Court affirmed. The decisions are unreported. *All* of the trial court decisions affecting this case were made by Judge Robert E. Maxwell, Chief Judge of the District Court for the Northern District of West Virginia.

Molever then sued the respondents, his lawyers in the trial and appeal against Levensons for neglect in the trial, post-trial and appeal handling of that case. In essence, the complaint charged that the defendant lawyers, through neglect, failed to take action during trial, post-trial and appellate proceedings which would have prevented the loss of the jury verdicts. A copy of the complaint is attached in Appendix B. The complaint was filed in the United States District Court for the District of Arizona—Molever's home and the locale of the original contract to render legal services. The District Court in Arizona denied jurisdictional attack by the defendant lawyers; but transferred the case to the Northern District of West Virginia pursuant to 28 U.S.C. § 1404 (a). Appendix B.

Upon transfer, the defendant lawyers filed new motions to dismiss, this time pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for, among other things, "failure to state any factual basis for a cause of action." Copies of the motions, which were filed without supporting memoranda, are attached in Appendix B.

The motions were ultimately briefed and argued on September 19, 1977. The sole issues presented were

whether the complaint stated a claim upon which relief could be granted and whether the second count of the complaint was barred by limitations. No affidavits were submitted. No depositions or other discovery were referenced.[3] (Record on Appeal, pp. 37-106) Following argument, and without any notice or request, the District Court advised counsel that it would then take judicial notice of the entire earlier trial proceedings and the appeal to the Fourth Circuit (which materials were not and could not have been before the court) and that it would consider all of that material in deciding whether to grant the motions to dismiss. It then granted the motions,[4] ruling as a matter of law that the record of the trial and appeal revealed no evidence of neglect which was a cause of losing the verdicts. (Appendix A). In essence, the District Court, without request, offered its opinion that the trial and appeal were adequately handled, and dismissed the case, thus preventing the introduction of any evidence, opinion or otherwise, that the case was *not* adequately handled. Even further, recognizing that a claim had been made that

[3] In fact, the District Court had stayed discovery pending the outcome of these motions. (Record on Appeal, pp. 48-50).

[4] It is unclear whether the court granted motions to dismiss, motions for summary judgment or both. It discussed, at length, the conversion of Rule 12 motions to Rule 56 motions for summary judgment, but then ruled that "for reasons of failure to state a claim upon which relief can be granted as we measure it under the more restricted rules as earlier indicated, and under the more expanded rules and the included material, the Court believes that the motions to dismiss the first count of the Complaint must be granted." Additionally, the formal order submitted by the defendant lawyers, and from which appeal was taken, ordered that "Count One of plaintiffs' amended complaint be dismissed for failure to state a cause of action upon which relief may be granted. . . ." (See Appendix A).

evidence existed which was *not* in the record and which would have prevented loss of the verdicts, the court ruled that "it would be hard to imagine anything further being developed than was developed in the earlier case." (Appendix A).

Plaintiffs requested the court to reconsider its ruling and to permit evidence on the issues of neglect, but the request was denied. (Appendix A).

On appeal, the Circuit Court affirmed the decision, thus approving the procedure followed by the District Court. In fact, the Circuit Court, as well, indulged in "reviewing the record,"[5] saying: "The record of the proceedings in the district court and in the appeal in the previous case discloses to us no evidence of legal malpractice *sufficient to entitle plaintiffs to a trial or a verdict.*" (emphasis added.) (Appendix A).

Thus, in virtual back-to-back cases, the Fourth Circuit has taken *all* of Molever's claims away. It has held that the Levensons' criminal conduct, which it described as "inexcusable deception", was "forgiven" by the bank. It has held that the Levensons knowingly false statements were "privileged." And finally it has held, without trial or factual presentation, that the lawyers were without neglect in causing the loss of verdicts, and that the lawyers could not have presented evidence or argument which would have changed that result.

The case, thus, presents a very real *public* issue: the erosion of the Seventh Amendment jury right and the

[5] It seems unlikely that both the District Court and the Circuit Court had the entire record of the prior case. It was not made a part of the record in the instant case. Thus, the previous record must have been in one court or the other.

preferential treatment of lawyers sued for malpractice. It also presents very real *personal* travesty and tragedy: the loss of over five million dollars in verdicts and the total denial of justice to a family which placed its trust in the court system.

REASONS FOR GRANTING THE WRIT

1) The decision of the Circuit Court is legally indefensible. It declares that none of the panel has any independent knowledge of the competency of the legal representation in the prior cases,[6] yet affirms summary judgment on the basis that it was competent. It approves judicial notice of the entire record in another case and all of the facts therein in the face of four Fourth Circuit decisions to the contrary. It approves judicial notice of contestible *opinion* matter (negligence). It states that Plaintiffs were given "full opportunity" to voice objection to the notice, when none was given. It affirms the granting of summary judgment without notice contrary to the decisions of this Court and four Fourth Circuit decisions. And it declares, amazingly, that these "procedural irregularities" were of no prejudice to the plaintiffs. But of most importance, it condones the practice of pre-trial dismissal of legal malpractice cases upon the judge's own perusal of the "record" of an earlier case and upon his personal opinion that there was no negligence.

2) The decision of the Circuit Court necessarily results in the creation of a favored class of litigants: lawyers charged with neglect in the handling of trials and appeals. The whole idea of a favored class of liti-

[6] An apparent acknowledgement of the conflict which occurs when one is asked to judge the correctness of his own judgment. In fact, one judge, Russell, was on *both* panels.

gants—a class treated differently before the bar of justice—is abhorrent to the Fourteenth Amendment's command of equal protection of the laws and the decisions of this Court in respect thereto. *Chambers* v. *State of Florida*, 309 U.S. 227, 60 S. Ct. 472, 84 L. Ed. 716 (1940). No other class of defendants charged with neglect receives this benefit. No doctor may even *request* the court to review his surgery and opine whether there was neglect. No architect may have his drawings so reviewed. No engineer his calculations. At a time when the Chief Justice of this Court has publicly decried the level of competence of lawyers in trial and appeal matters,[7] the Circuit Court has approved a procedure which will further insulate lawyers' conduct from public scrutiny. Unlike medical review panels, which have sprung into some favor recently,[8] the procedure approved by the Circuit Court *removes* the lawyer's conduct from any public scrutiny, leaving it solely to the judge (another lawyer) to say that "there was no negligence." And unlike medical review panels, which serve to generate access to courts and which *never* prevent access, even when all of the panel members feel there is no neglect, the procedure approved by th Circuit Court totally defeats access to fact finding and a jury's determination.

3) The decision of the Circuit Court violates the Seventh Amendment's guarantee of the right to jury trial and this Court's rulings thereon. For one hundred and ninety years the supreme law of our land has compelled that:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of

[7] See, Comments of Chief Justice Warren Burger before the American Bar Association, A.B.A. Journal, Vol. 64, P. 313 (1978).

[8] See, e.g., Arizona Revised Statutes § 12-567.

> trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law. (Amendment VII)

With the stroke of a wide brush, and without citation of authority, the Circuit Court has held this mandate of our Constitution not to apply to lawsuits against lawyers. This Court has held that a court errs whenever, without consent, it passes upon evidence, finds facts and renders judgment, thereby substituting itself for the jury. *Baylis* v. *Travelers Ins. Co.,* 113 U.S. 320, 5 S. Ct. 494, 28 L.Ed. 989 (1885). The decision of the Circuit Court not only permits such substitution as to *facts,* but as to matters of *opinion:* whether the lawyers' conduct fell below acceptable levels of practice. The Circuit Court opinion, in stating that there was no evidence of neglect "sufficient to entitle plaintiffs to a trial or a verdict," implies there *was evidence of neglect.* Thus, both the District Court and the Circuit Court passed upon that evidence, weighed it, and found the issue in favor of the respondent lawyers.

4) The decision of the Circuit Court violates the letter and intent of Rule 56 of the Federal Rules of Civil Procedure. Summary judgment can be entered only if there is no dispute as to *any* material fact. *Fountain* v. *Filson,* 336 U.S. 681, 69, S. Ct. 754, 93 L. Ed. 971 (1949). Since both the District Court and the Circuit Court "reviewed the record" in the blind—that is, without any indication, before or after as to what was being considered—it is impossible to determine what facts are in issue. That is precisely why Rule 56 requires the motion to contain reference to the facts that are claimed to be undisputed, whether by affidavit or otherwise, and requires notice and opportunity to demonstrate that the facts *are* in dispute. Rule 56(c). The District Court gave no notice that it intended to consider or judicially notice the underlying "record". It gave no notice that it intended, if it did, to treat the motions to dismiss as motions for summary judgment. It afforded no opportunity to present evidence, by affidavit or otherwise, showing a disputed material fact before entering its order dismissing the case. In the face of numerous of its own decisions, the Circuit Court affirmed that procedure. *Utility Control Corp.* v. *Prince Williams Const. Co.,* 558 F.2d 716 (4th Cir. 1977); *Plante* v. *Shivar,* 540 F.2d 1233 (4th Cir. 1976); *Gelman* v. *State of Maryland,* 538 F.2d 603 (4th Cir. 1976); *Mims* v. *Keys,* 516 F.2d 21(4th Cir. 1975); *Johnson* v. *RAC Corporation,* 491 F.2d 510 (4th Cir. 1974).

While this Court has affirmed that the summary judgment procedure does not violate the Seventh Amendment, *Nave* v. *City of Seattle,* 68 Wash. 2d 721, 415 P.2d 93 (1966), *appeal dismissed,* 385 U.S. 450, 87 S. Ct. 614, 17 L. Ed. 2d 513, *rehearing denied,* 386 U.S. 929, 87 S. Ct. 853, 17 L. Ed. 2d 803, the decisions in *Baylis* v. *Travelers' Ins. Co.,* and *Fountain* v. *Filson, supra,* make it abundantly clear that the safeguards which prevents violation of the jury trial right in summary judgment procedures are *notice* and the *opportunity to present* contrary evidence. If one can present such evidence, no matter how insignificant, summary judgment will yield to trial by jury. Here, those safeguards were eliminated; and the District Court substituted itself for the jury—substituted its opinion for those of properly qualified experts—thus effectively denying the jury trial right.

5) The Circuit Court decision approves the violation of Rules 201 and 605 of the Federal Rules of Evidence. Those rules provide:

> *Rule 201. Judicial Notice of Adjudicative Facts*
>
> (a) *Scope of rule.* This rule governs only judicial notice of adjudicative facts.
>
> (b) *Kinds of facts.* A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> (c) *When discretionary.* A court may take judicial notice, whether requested or not.
>
> (d) *When mandatory.* A court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> (e) *Opportunity to be heard.* A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
>
> *Rule 605. Competency of Judge as Witness*
>
> The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

These rules also safeguard the Seventh Amendment jury trial right. They assure that the judge will consider, as fact, only such matters as are beyond reasonable dispute. Key to the rule on judicial notice is that *only facts* may be noticed—not opinions. Here, the District Court violated the rule and the Circuit Court approved that violation in four regards: First by attempting to notice an entire record, including the conflicting evidence, conflicting inferences and conflicting opinions stated therein and possible to be drawn therefrom; second, by failing to give notice of its intent to take notice; third, by failing to give notice concerning what facts were "noticed" and thereby finding; and finally, by failing to give opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed.

Congress undoubtedly has authority to prescribe what evidence will be received in courts of the United States. *Tot* v. *United States,* 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943). Both Congress' rule, and the Seventh Amendment's jury trial guarantee are violated when courts are permitted to "notice" matters which are neither generally known nor capable of accurate and ready determination. When this is done to benefit a lawyer, Congress' concern seems all the more warranted.

Congress also made it abundantly clear that it did not want judges testifying in the cases coming before them (Rule 605). While at first blush the rule may not seem applicable, on closer analysis it clearly is. What happened in this case, and what the Circuit Court approved, was the submission of the trial judge's (albeit unsworn) opinion regarding the conduct of the lawyers based upon his review of the record of the trial they conducted. The judge offered, as witness, and thus accepted as judge, his own opinion that what he reviewed did not show actionable neglect. He then entered judgment based upon his opinion. The evil therein is potent —so potent that Congress provided that no objection

need even be made thereto. Again, the jury trial right has been sacrificed to the opinion of one man, one judge, one lawyer, about the conduct of his fellow lawyer. Add to that the apparent conflict whereby the judge, to find neglect, must admit the possibility of an erroneous decision on his own part in the earlier proceeding, and the scales of justice are heavily weighted—in favor of the lawyers.

6) The Circuit Court decision is wrong regarding the underlying neglect. The Circuit Court affirmed the District Court ruling that nowhere in the record of that four week trial and appeal—nowhere in those thousands of pages of testimony—nowhere in those hundreds of pages of briefs, memoranda and exhibits is there even one inference of neglect which might have affected the outcome. There was. The Court was referred to eight trial exhibits (in the Levenson trial) and many pages of testimony which showed that Molever had *denied* the false charges prior to publication and that others had admitted the charges and exculpated Molever prior to publication of the defamation. (Appellants' brief, pp. 43-45). Petitioners pointed out to the Circuit Court that such evidence would support the jury verdict on the basis that Levensons had published the defamation in "reckless disregard" of other evidence (including the denials and exculpations) or with "known falsity," thereby overcoming any privilege which may have attended the publication. *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).[9] Petitioners also pointed

[9] In fact, as was pointed out to the Circuit Court (Petition for rehearing, pg. 7), it had decided almost simultaneously with the *Molever* v. *Levenson* appeal that testimony from a plaintiff suing for defamation that he had denied the defamatory charges prior to publication was *alone* sufficient to support a jury verdict of "known falsity" or "reckless disregard." See *Appleyard* v. *Transamerican Press, Inc.*, 539 F.2d 1026 (4th Cir. 1976) It is virtually inconceivable that the court which made that decision would have sustained the judgment N.O.V. on the basis of privilege *if the lawyers had briefed the issue and pointed out the evidence of denial and exculpation.*

out that the respondent lawyers had totally failed to brief this issue to either the District Court or the Circuit Court in the prior case or to refer either of those courts to the evidence in the record establishing the "reckless disregard" or "known falsity." Similarly, it was pointed out that the respondent lawyers failed to brief, argue or refer to evidence which showed that that the Levensons "embellished" upon the report which they relied upon in making the defamatory statements, thus, again defeating any privilege. *Dorn* v. *United States,* 195 U.S. 138, 24 S. Ct. 808, 49 L. Ed. 128 (1904). (Appellants' brief, pp. 44-45). Additional evidence of neglect was pointed out.

Finally, Molever's affidavit was submitted to the District Court in a last-minute effort to change the result. That affidavit, which may be found in the joint abstract at page 130, affirmed, under oath, that the respondent lawyers admitted to Molever, that they never read the trial transcript in preparing the appeal. Thus, the Circuit Court has held, as law, that absolutely no inference of neglect arises from uncontroverted evidence that a lawyer has not read any of the trial transcript in preparing an appeal, concerning contested issues of fact, to a Circuit Court of Appeals. There *were* inferences of neglect—in the record noticed, and supplemental to it.

CONCLUSION

Petitioners recognize that this Court does not exist to correct errors. However the Circuit Court decision does not represent mere error. It is a flagrant, indefensible departure from the decisions of this Court and the supreme law of our land. It marks a singular departure from the Constitutional, Statutory and Federal Rule provisions guaranteeing *all* citizens a jury trial in Federal Courts. It also marks, for the first time in this country, the creation of a favored class of litigants—lawyers. For both reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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July 12, 1979

APPENDIX A

[159]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 77-183-E

MODERN MARTS, INC., a Pennsylvania Corporation; PITTSBURGH & WEST VIRGINIA INVESTMENT CO., a Pennsylvania Corporation; BETTY BERNSTEIN: SHIRLEY L. WEINBERGER, as custodian; DON D. BROOKS; I. M. MOLEVER; and JEAN B. PARIS, *Plaintiffs,*

v.

STANLEY E. PREISER and JOHN F. BROWN, JR.,
Defendants

September 18, 1977
Elkins, WV

BEFORE: The Honorable ROBERT E. MAXWELL, Chief Judge

APPEARANCES:

For the Plaintiffs:

Charles D. Roush, Esq., Phoenix, AZ

For the Defendants:

Mr. Herbert G. Underwood, Esq., Clarksburg, WV

Mr. Edward W. Eardley, Esq., Charleston, WV

Whereupon, the above styled matter came on for a hearing on motions on the 19th day of September, 1977

in the United States District Court, and the following findings and conclusions were given by the Court, to-wit:

[160]

PROCEEDINGS

THE COURT: The litigation before the Court overlaps with several claims and to reach the issues that are apparent in this litigation today on the motions that are here and now, it perhaps would suffice us and be profitable to us to go into a brief overview of what we are dealing with.

This would certainly keep our record straight and would tend to our bookkeeping in this matter because of the several motions that are pending, such as the motions to dismiss that have been cast as we might say in the second priority position.

The amended complaint, which we are dealing with here, was filed in the United States District Court for the District of Arizona and this was on April 13th of 1977. And this relates back, of course, to the original complaint of April 4, 1977.

Count 1 of that Complaint is representative of all the plaintiffs in the case and it is directed against both of the named defendants. In essence, Count 1 charges the mishandling of the litigation as was called in the Fourth Circuit, "Molever v. Levenson", and which have been referred to in the pleadings of this case and which has been carried on our Court file as Civil Action No. 74-2W. This was a consolidation of three separate and distinct causes of action.

[161] Count number 2, while it incorporates certain initial paragraphs of Count number 1, and which by reference would incorporate both of the defendants, is by virtue of its more particularized allegations, directed toward and against the defendant Preiser alone.

Number 4 of Count 2 particularizes the defendant Preiser and the Court does not recall other than the referenced

paragraphs, the involvement of the defendant Brown in that matter.

The second Count charges that the defendant Preiser failed to prosecute a cause of action that the plaintiff Molever had. It also charges him with improperly advising and causing Molever, the plaintiff Molever, to dismiss a cause of action that he had instituted. It also accuses the defendant Preiser of failing to amend Civil Action 74-2-W so as to include a cause of action on a letter which was written by—allegedly written by—Abraham Pinsky, an Attorney in March of 1971. The point of reference we have on the litigation in Count No. 2 is March of 1971.

There was no particular date assigned but the entirety of Count 2 goes to March of 1971, that month and that year.

The defendants have responded with a counter claim and first of all, defendant Preiser seeks attorney fees in the sum of $298,066. He also alleges malicious prosecution [162] and abuse of civil process arising out of the allegations that are set forth in the complaint and in the Amended Complaint that is now before this Court; this matter having been transferred here by the District Court of Arizona to the Northern District of West Virginia.

The third count of the Preiser counter claim is one of libel, slander, and defamation arising out of the allegations of the Complaint and Amended Complaint now before the Court first and secondly; two other persons. A conversation apparently was carried on which has not been otherwise particularized.

The defendant Preiser seeks the sum of $298,066 in the first cause of action and $1,000,000 plus fees and costs in the malicious prosecution cause of action, and $1,000,000 compensatory damages and $1,000,000 punitive damages in the dafamation counterclaim, the third cause of action.

We have the counter claim of the defendant Brown. He seeks Attorney fees in the first cause of action in the counter claim in the total sum of $51,114.47.

He, too, alleges malicious prosecution and abuse of civil process, and he seeks compensatory damages in the sum of $1,151,114 and punitive damages in the sum of $1,000,000. Presumably, although this is not expressly stated, on the four corners of the pleadings he is seeking damages in the amount of $1,000,000 on the malicious prosecution compensa- [163] tory damages.

Now, this is the structure of the litigation to which we must address ourselves.

There have been formal motions to dismiss by the defendants. In the plaintiffs' reply, there have not been in so many words, a formal motion to dismiss, but the language of the plaintiffs' reply seeks a dismissal of the counter claims. It seems fair and logical and efficient that we should, at this juncture of our proceedings, read the pleadings in a sense that would give effect and cause to their filing. So it would seem that we have before us motions to dismiss with regard to both the complaint and to the counter claim.

The language of the formal motions of the defendants and the implied language, at least, of the plaintiffs in the reply to the counter claims leaves little doubt that the parties were thinking in terms of, and directing the nature of this proceedings, toward a Rule 12(b)(6) motion for dismissal on the failure to state a claim upon which relief can be granted.

The 12(b)(6) motion is a very limited opportunity to dismiss a case as we look at it in the general purport of the language of the Rule itself, study the history and so forth, and the evolution of it.

There are, of course, some exceptions with regard [164] to the law of libel litigation, the law of libel and slander and malicious prosecution.

The test for a Rule 12(b)(6) motion is pretty fairly stated in Federal Practice and Procedures by Wright and Miller, Volume V and particularly Section 1357 which contains the subheading of "Practice under 12(b)(6)".

Now, at page 600, Professors Miller and Wright say as follows.

> "The test most often applied to determine the sufficiency of the complaint was set out in the leading case of Conley v. Gibson, in which the Supreme Court stated that in appraising the sufficiency of their complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Now, continuing on with the text, Professor Wright says, "The question, therefore, is whether in the light most favorable to plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. The complaint should not be dismissed merely because plaintiff's allegations do not support the legal theory he intends to proceed on, since the Court is under a duty to examine the Complaint to determine if the allegations provide for relief [165] on any possible theory. Similarly, it need not appear that plaintiff can obtain the particular relief prayed for, as long as the Court can ascertain that some relief may be granted. Nonetheless, as is discussed more fully elsewhere, the pleader must set forth sufficient information to outline the elements of his claim, or to permit inferences to be drawn that these elements exist.

Nor should the complaint be dismissed merely because the Court doubts plaintiff will prevail in the action.

Whether plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the pleadings. The Court should be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is novel or extreme, since it is important that new legal theories be explored and assayed in the light of actual facts rather than a pleader's suppositions. In any event, the motion for summary judgment provides a more expeditious and effective procedure for quickly terminating an action that does not appear to merit relief on its substantive merits.

As a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. In other words, dismissal is justified only when the allegations of the complaint itself clearly demonstrate that [166] plaintiff does not have a claim. For example, in Case v. State Farm Mutual Automobile Insurance Company, plaintiff claimed damages for defendant's wrongful termination of a contract. However, the terms of the contract, which was attached to the complaint as an exhibit, show that defendant has the right to terminate with or without cause. Since it was clear that plaintiff had not stated an actionable claim, the Court dismissed the claim under Rule 12(b)(6). Similarly, when the complaint in an action for negligence contained allegations indicating that the sole proximate cause of the injury was the negligence of the plaintiff and not of defendant, the complaint was dismissed for insufficiency."

There are some other examples, but I think that gives us a fairly good cross-section of the limited opportunities that do arise under Rule 12(b)(6) motions.

Now, continuing on with this, I would refer to Section 1357 at page 610, where Professor Wright notes as follows.

"There is one significant exception to the general rule that the complaint will be construed liberally on a Rule 12(b)(6) motion. When the claim alleged is a traditionally disfavored cause of action, such as malicious prosecution, libel and slander, the Courts tend to construe the complaint by somewhat stricter standard and are more inclined [167] to grant a Rule 12(b)(6) motion to dismiss. For example, in National Bowl-O-Mat Corporation v. Brunswick Corporation, the Court dismissed the third count of the defendant's counter claim for failing to state a claim for defamation. Two of the pleading deficiencies noted by the Court were defendant's failure to set out the alleged defamatory statements with sufficient particularity to allow the Court to determine if they would support the action, and defendant's failure to plead dates indicating that the action was not barred by the Statute of Limitations. If the Court had applied the usual liberal standards for construing a complaint, it probably would have assumed, for purposes of the motion, that the statements were dafamatory and that the action was timely."

There is another reference that might be made just in passing, and that is the contents of Section 1245 of the same Volume of Wright and Miller and this having to do with the question of libel and slander and Section 1246, that has to do with malicious prosecution. The latter two sections in looking at the cause of action in light and from the view point of a Rule 8 aliegation.

Mr. Roush mentioned to us in his comments and, of course, it is referred to here in the matter just mentioned where I read from Professor Wright, and that is the test of a claim can be best arrived at through the motion for summary judgment process and whether it stands the test of time [168] and is a claim that relief can be granted upon is usually raised in that particular. So, it is another avenue that is available.

Now, in looking at Rule 12, the last sentence thereof and sub-paragraph B, we find, "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to, and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

And this goes right to the suggestion that Mr. Roush has made here this morning.

Now, Wright and Miller have some commentaries on the conversion of a Rule 12(b)(6) motion to a summary judgment motion. Section 1356 of the same Volume of Wright and Miller which I have earlier referred to, this refers to the last sentence of the Rule that I just mentioned here. Now, on page 676, Professor Miller speaks as follows:

"Technically, of course, the Rule 12(b)(6) motion does not attack the merits of the case; it merely challenges the pleader's failure to state a claim properly. As noted above, however, since the promulgation of the Federal Rules [169] most Courts have allowed the parties to go beyond the question of the complaint's formal sufficiency and to introduce affidavits and other matters in conjunction with the Rule 12(b)(6) motion, to ascertain whether there is any merit to the claim. In that sense, the Rule 12(b)(6) motion is closely related to the summary judgment motion and the addition of the last sentence in Rule 12(b)(6) merely acknowledges that fact.

Although the conversion provision in Rule 12(b) expressly applies only to the defense described in 12(b)(6), it is not necessary that the moving party actually label his motion as one under that provision in order for it to be converted into a motion for summary judgment. The element that triggers the conversion is a challenge to the sufficiency of the pleader's claim supported by extra-pleading material. It is not relevant how the defense actually is denominated."

Now, over on page 679 of that same Section, Section 1366, the text continues as follows.

"When the extra-pleading material is comprehensive and will enable a rational determination of the summary judgment motion, the Court is likely to accept it; when it is scanty, incomplete or inconclusive, the Court probably will reject it."

Now, going on further down it says, "Once the Court [170] decides to accept matters outside the pleading, it must convert the motion to dismiss into one for summary judgment, and several Courts have held that it is reversible error for the District Court to consider outside matter without converting the motion to dismiss into a motion for summary judgment. A few Courts have limited this compulsory aspect of the last sentence in Rule 12(b) by holding that only items specifically enumerated in Rule 56(c) constitute matters outside the pleading. Under this interpretation, only depositions, answers to interrogatories, admissions on file, and affidavits are sufficient to convert a Rule 12(b)(6) motion. Most Courts, however, view matters outside the pleading as including any written or oral evidence in support of, or in opposition to the pleading that provides some substantiation for, and does not merely reiterate what is said in the pleadings."

Now, going over to page 683, the text continues as follows. "As soon as a motion to dismiss under Rule 12(b)(6) is converted into a motion for summary judgment, the requirements of Rule 56 become operable. It is important that the Court give the parties notice of the changed status of the motion and a reasonable opportunity to present all material made pertinent to such a motion by Rule 56. In

this way, no one will be taken by surprise by the conversion. Once the proceeding becomes one for summary judgment, the moving [171] party's burden changes and he is obliged to demonstrate that there exists no genuine issue as to any material fact and that he is entitled to a judgment as a matter of law."

Just one more reference that I would bring to our attention in this matter and that is on page 664 and is Section 1364.

"The use of extra-pleading material on a motion under Rule 12(b)(6) has caused considerably more difficulty, however. Soon after the Federal Rules went into effect, a controversy as to whether Rule 12(b)(6) permitted the use of affidavits and other materials arose among the commentators and the Courts. The majority view was to the effect that Rule 12(b)(6) overturned the common law bar against the speaking demurrer and permitted a speaking motion to dismiss for failure to state a claim for relief."

Now, turning over to page 668 of this text, in pertinent part it goes on to say, "The 1948 amendment to Rule 12(b), which added the last sentence to the sub-division, and the parallel amendment to Rule 12(c), leaves no doubt that materials outside the pleading can be presented in support of a motion to dismiss. The purpose of the amendment was to resolve the split of authority concerning speaking motion by providing a definite base in the Rules for the treatment of Rule 12(b)(6) motions supported by matters extraneous to the pleading.

[172] It should be noted that no distinction is made in the amended Rule between a motion that simply negates the allegations in the pleading, and one that raises affirmative defenses. The Courts, however, have had little difficulty in concluding that the 1948 amendment applies to affirmative defenses as well as to denials and that these defenses may be made on a motion to dismiss even though they do not appear on the face of the Complaint.

A wide range of material may be introduced in conjunction with a Rule 12(b) motion, subject, of course, to the Court's discretion to reject the evidence if it feels it is not substantial or comprehensive enough to facilitate the disposition of the action. The illustration of the type of evidence that has been used on a Rule 12(b)(6) motion are the following: admissions of counsel, affidavits, answers to interrogatories, collective bargaining agreements, contracts, copyrighted material, depositions, exhibits, hearsay, issues of a magazine, Court judgments and orders, judicial notice of prior pleadings, leases, letters, oral arguments, prior pleadings, and transcripts of prior court proceedings. Memoranda and briefs also may be submitted to support or oppose a 12(b) motion, although their contents probably does not qualify as evidence."

So there we have a very interesting procedural undertaking in this case where both parties have resorted to [173] a base case, we will call it, our Civil Action No. 74-2-W. That record, of course, is before the Court with all of the pleadings and with all of the exhibits and with all of the rulings and the 4500 pages of transcript. We have that entire record here and indeed, it seems that it is incumbent upon the Court in a matter of this nature, to judicially notice such a record since it is so intimately involved with the litigation that we have at hand.

Also, the Court must at least take judicial notice of the appellate record of the base case which was the entire record at the Court of Appeals for the Fourth Circuit. The Court with or without judicial notice is bound as is the law of the land, to obey that decision that came down from that appeal.

Let me now make a reference to that at this time and this is Molever v. Levenson and it is reported in 539 Federal Reporter, 2nd, 996. So, we have those matters and they are in this case.

In this case we have the early wave of discovery that has been presented to us and admitted, to a limited degree. The Court must also take this into account.

Now, whether malpractice litigation falls into the same category as libel and slander with regard to the extent of the allegations that we call disfavored or vexatious, that certainly is not an issue here.

[174] Certainly, some appellate court on some day will discuss this issue and in the appropriate case with the proper factual underpinnings very likely will say that this is a disfavored area of litigation if its principal purpose is harrassment and something in the nature of vexatious litigation.

Going on now to this matter. We have to determine if this is one upon which relief can be granted. There has been referred to this Court and independent research has disclosed that we have an expanding area of litigation in attorney malpractice cases. There have been general expressions of expanding the law in this area by some Courts and expanding legal malpractice. Those expressions and those rulings and those findings, it seems, must be weighed in light of the factual premises of the particular case, so as to properly distinguish actionable misconduct from practical conduct of a client's affairs. We must, of course, know that these are measured in hindsight and of retrospect and so, it seems that this observation is pointed and is appropriate at this time regardless of what standard or duty or error of negligence or standard of performance might be ultimately adopted in this area.

Now, going to the conversion of 12(b)(6) motions that are before the Court by both sides to a summary judgment motion under Rule 56. It would seem that we have just about [175] everything that is the basis of this case in this Court. This has been retained in the District of Arizona, of course if that was so, this Court would not have had immediate access to the file of 74-2-W. And it is important that the

file be available to us to know the reasons and the grounds and the rationale of the litigation that is here.

So, in looking at this as both a 12(b)(6) motion, limited as it is, and looking at it also from the broader expanse of the Rule 56 summary judgment plateau, let's measure here the defendants' motion to dismiss the Complaint in Count 1.

It would seem that the motion to dismiss as filed by the defendants as to Count 1 go basically to the adverse ruling to the plaintiffs in 74-2-W. And that it is the result of a rule of law, if we listen to the defendants, rather than to a malpractice matter determined from the facts as contended here by the plaintiff.

We must break this down. We must break this down into the several claims that were raised in the basic litigation. We must look to the law that controls this Court, namely; the Fourth Circuit decision of May 3, of 1976.

Let's turn first to the 10(B)(5) litigation where the verdict was for the sum of $59,496 in the original cause of action.

The Fourth Circuit in page 1000 of their opinion [176] said that, "No breach of the Act by this Appellant is perceived. There was no device, scheme, or artifice to defraud . . . in connection with the purchase or sale of the (the stock). Although not demandable, Molever had been given due notice of the intended sale. Moreover, he had been sent a financial statement of the Bank showing the addition to the Bank's assets. In Law, on these facts, he had no ground of complaint. Therefore, the verdict and the judgment in this action must be reversed and vacated."

So, it would appear that the law of the land with regard to the 10(B)(5) claim is thoroughly established. The law is pretty well stated on that.

Now turning next to the floor plan, the so-called floor plan claim. This is a part of the derivative action, the

stockholder's derivative action. We have the Reichart's floor plan and this was an organization, or a business, which was owned by the Levensons. It was claimed there that they had misused their position.

The record in this Court on this claim seems to be rather full and rather complete. As a matter of fact, the Fourth Circuit's opinion on page 1000 commented and said,

"Despite the inexcusible deception by the defendants, subsequent arrangements for release and indemnification negate plaintiff's right of recovery."

Here there was a finding by the Court, and this is [177] on page 1001 of the opinion. "Assuming that the West Virginia statute required the defendants to substantiate the justice and bona fides of the agreement, to us they did so by clear and convincing evidence. It is overwhelming in their favor on the issue." Now, going on over to page 1002 of the opinion. "On this uncontrovertable evidence we uphold the agreement. In short, plaintiffs' proof just did not pass the test exacted by the State's Jurisprudence;"

Now, going on further with the text of the opinion, they say. "In view of the grounds of our decision, there is no need further to ponder these points. Upon defendants' motions, the District Court's final order on this cause of action must be reversed, with judgments for the defendants."

So there, both on the facts and on the effect of the contract of idemnification, what have you or whatever you want to call that, the Fourth Circuit, as a matter of law, has pretty well wiped out that floor plan contention.

Now, turning to the Dennis Line of automobile loans. There was some almost $900,000 worth of those loans, and apparently about half of them were bad. They have remanded that one for another trial. So, we have a claim here that is premature.

We also have another aspect of this that we must think about. In an earlier preliminary proceedings that was before the Court on the question of jurisdictional amount, [178] the Fourth Circuit in Bernstein v. Levenson at 437 Fed 2nd, 756 which was a 1971 case, spoke of this stockholder's derivative action as being in favor of the Bank. Page 1003, the Court said. "We previously held in earlier proceedings that the real party in interest in this derivative action is the Bank. The award of damages to the stockholders, instead of the Bank, was therefore erroneous."

The judgment order as corrected on the 21st of May, 1974. "That the plaintiffs and all other stockholders of the Bank of Wheeling similarly situated recover of and from Robert Levenson, Donald Levenson, and Reichart Furniture Company, the sum of $1,230,520," and then the rest of that is self-explanatory.

Now, going on after the semi-colon there, it says, "And said plaintiffs and all other stockholders of said Bank similarly situated recover from and of Robert Levenson and Donald Levenson the sum of $700,000 as a result of the Dennis Line loans," and then the rest of it is explanatory also. So, apparently when this was before the Fourth Circuit, these were ascertained and determined as to who should prevail and who is the real party in interest. And of course, that did not preclude anybody with standing to come forward and to prosecute the case. But the real party in interest is what it says. But this is something that as of yet has not been determined and we are now in the early stages of the re- [179] structuring of the basic case for disposition here and now.

Now, going on. We are faced there with those problems and in other words, we are dealing here with the complaint of $5,330,016, I believe that is the total amount of the amended complaint and the addendum clause and eliminating the Dennis Line of auto loans because it is a pending matter and thus is premature here, that would be $700,000.

So eliminating the Reichart's floor plan of $1,230,520 and eliminating the 10(B)(5) cause of action of $59,496, we are then left with the defamation claim which the jury verdict was on all counts, came out to Three and a-quarter Million Dollars. It was this claim that the Court, this Court, set aside the jury verdict on and this was then affirmed by the Fourth Circuit Court of Appeals.

Now, let's look to the malpractice issue here as measured against the defamation. We have the defamation occurring on September, September 29th of 1966, and that being at a Board of Directors meeting. That was the first cause of action and that was against Robert Levenson alone.

The second basic cause of action under defamation was against Robert Levenson, Donald Levenson, and Joseph Gomphers, their Attorney.

Now, this allegedly occurred at the Board of Directors meeting in February of 1967. Now, going on to the third defamation as alleged, that occurred on November 25, 1966 and [182] an area that could be further developed, that the defendants here failed to introduce evidence that would lead this matter further along the road to an affirmative accomplishment, but for their negligence. But the evidence in this case is rather striking. It would be hard to imagine anything further being developed than was developed in the earlier case.

So we have here these causes of action which to the Court seem to be causes of action that are governed by very well defined rules of law set down by the Circuit Court of Appeals for the Fourth Circuit.

Because they are matters of law, and because the claim must be a claim upon which relief can be granted, the Court believes that as to these aspects of the matter, *the* motions to dismiss must be granted.

Now, there is another area that is raised by the motions to dismiss and that is, namely, there can be no malpractice

cause of action if there are errors of judgment and/or trial tactics, or secondly, in the Appellate practice, as long as the rules of practice are observed and appeals are handled in a timely fashion and properly presented. That perhaps does not articulate the matter as fully as the defendants have done in their motions.

Looking at that, it seems important to us to turn to this Woodruff case that has been mentioned by both sides. This is found in 423 Federal Supplement at 1284 and is a 1976 [183] case and comes to us from the United States District Court for the Western District of Tennessee.

We have Chief Judge Bailey Brown writing the opinion for the Court. Now this was a case which was based upon legal malpractice and the cause of action was a personal injury suit, and this had more added to it perhaps, than what we have in the case before the Court.

The matter had been dismissed by the District Court and then it was sent back by the Sixth Circuit Court of Appeals for trial. The trial was had, the jury failed to reach a verdict. Judge Brown took the case away from further submission to the jury.

In this case, they presented a summary of injuries and damages and the entire transcript, except the part dealing with the injuries, the personal injuries in the personal injury case, was read to the jury as well as the lengthy charge and so forth. In other words, the whole personal injury case upon which this legal malpractice was based was read to the jury insofar as it was really pertinent to the issues.

Then the Court said, at page 1287, "This Court had concluded that questions of law with respect to the personal injury trial became, with the aid of expert testimony, questions of fact for the malpractice jury and were so treated, leaving for the Court questions of malpractice law."

[184] And then an expert testified as to the accident reconstruction and how the claims were not investigated properly and so forth.

Then as I recall it, the Court took the question of Appellate negligence from the jury in this case, but that is not important to our issue here.

Going now over to page 1288, the Court said as follows, "It seems to this Court that there are two main problems in maintaining such a case as this. The first is that the preparation for and the trial of a law suit to a jury requires the exercise of a kind of judgment that is quite different from the kind of judgment exercised by other professions. This is so because in dealing with human beings as the trial lawyer must, be they witnesses, judges, clients, adversary counsel, and jurors, the factors that come into play are intangible and numerous, so that the trial lawyer has to rely on his education, practical experience, rationale, analysis, and sheer instinct in making decisions. This being true, it was difficult for this Court to believe it would be proper to submit to a jury, based upon the expert testimony of a second-guessing lawyer who has the benefit of hindsight, the question of whether the trial lawyer was negligent.

The second reason why this Court had serious doubt as to whether this action could be maintained has to do with causation; the malpractice jury is called upon to determine [185] whether, if something that was done by the defendant's trial lawyer had not been done, or something that was not done had been done, the jury verdict in the personal injury case would have been different."

And then going over to page 1289, the Court speaks of additional matters in that case, namely, dealing with the conflict of interest claims. Of course, we don't have any of that in this. The up-shot of the Woodruff opinion was that judgment was entered for the defendant. In other words, the Court, with the benefit of the total record and with the

benefit of the evidence and the witnesses, with the benefit of the charge to the jury and the whole record before him as developed, let the matter go to the jury, and upon reflection and upon deliberation, determined that under those circumstances, under those issues which were so very closely parallel to our case here, thought it was not a matter that should be disposed of on the facts, but it should be disposed upon the law.

Another area that is enlightening to us are the comments in Amjur 2nd, Attorneys at Law, Section 170.

"If an attorney acts in good faith, and in an honest belief that his acts and advice are well founded and in the best interest of his client, he is not held liable for a near error of judgment." Now, going on down to the last [186] paragraph of that section. "In the absence of an express agreement, an attorney is not an insurer or guarantor of the soundness of his opinion, or of the successful outcome of litigation." And then going over to the Appellate level on this issue, and this is Section 172, it is said, "Negligence of an attorney in failing to take proper steps to protect his client's right of appeal or review has been held actionable where, as a result, the right of the appeal was lost. But it has been held that charges of negligence in failing to obtain Appellate Review or a new trial after an unfavorable judgment or verdict below would not support a verdict against the attorney in the absence of a showing that if the appeal or new trial had been obtained, a judgment more favorable to the plaintiff would have resulted."

Well, in looking to our case file, the base litigation which is here, which is 74-2-W, the plaintiffs acquired everything that they could ask for. They acquired everything. They have been deprived of the factual side of their case by virtue of the applicable law as read by this Court and as read by the Fourth Circuit. There are, of course, emerging areas of malpractice being developed. I was referred to, and I have a xerox copy of the American University Law

Review article, which is Volume 26, page 408, and at page 433 where the writer says, "A client faces the most difficult burden of proving causation when he alleges that his attorney was [187] negligent in preparing or conducting litigation. The client must prove that the result of the prior litigation would have been different but for the attorney's negligence. Such proof can be made only by trying the original action in the present malpractice trial, thus creating a suit within a suit. The client must prove that he had a sound claim or defense in the original action or that the attorney negligently failed to effect an appeal that would have been sustained."

And then going on now to the next paragraph.

"The requirement that the first suit be proven within the second is merely a reflection of the basic tort law principle, that to establish liability for negligence, the plaintiff must show that but for the defendant's negligence the injury would not have been sustained. If the plaintiff in a malpractice action would have lost the original suit notwithstanding the attorney's negligence, then that negligence did not cause any injury in fact, and no liability attaches."

That language has such a ring to it in this litigation, it seems, in light of the voluminous factual record that we have and in light of a ruling on the law by the Fourth Circuit.

So, again, for reasons of failure to state a claim upon which relief can be granted as we measure it under the [188] more restricted rules as earlier indicated, and under the more expanded rules and the included material, that certainly seems germaine and valued in this matter, the Court believes that the motions to dismiss the first count of the Complaint must be granted.

There are further grounds cited that the Statute of Limitations on this first count of the claim and in view of the Court's ruling, which is dispositive of the issue, it does not

appear necessary at this time for the Court to address itself to that issue.

Now, let's turn to defendants' motions to dismiss count 2 of the Complaint. This is an action where the plaintiff Molever alone sues the defendant Preiser alone. The defendant Brown is a party by reference but not by any specific allegations, but that is something that could be corrected or modified on amended pleadings and that is not a definitive or final ruling, but just a mere observation.

Now, looking at paragraph 4 of count 2 of the Amended Complaint in this matter, it says, as follows. It is short so I will just go ahead and read that. "Defendant Preiser thereafter agreed to file and prosecute the appropriate damage action against Pinsky and the Levensons, but negligently failed and refused to do so within the time proscribed by the applicable statute of Limitations. Furthermore, the defendant advised and prevailed upon plaintiff to [189] dismiss a complaint for damages for defamation that had previously been filed against said Pinsky and refused to amend the Complaint in said proceedings to seek damages for the defamatory letter of March, 1971. Defendant also negligently advised plaintiff that no separate action could be filed seeking damages for the Pinsky letter. Plaintiff's causes of action against Pinsky have been forever barred by the applicable Statute of Limitations. Plaintiff's causes of action aforesaid had a reasonable damage value and at least $1,000,000 compensatory and punitive damages."

Well, we have at least three claims here that we must look to. During the period of the original cause of action which is 74-2-W, a defamation occurred. Now, turning to paragraph 3. "Abraham Pinsky, of Wheeling, West Virginia, published a letter to at least two newspapers with National circulation, the Los Angeles Times and the Washington Post, and to two separate committees of the United

States Congress, which letter defamed plaintiff Molever and caused him substantial damages." And so forth.

And that goes on to say that the letter was written during the pendency of 74-2-W. That was the litigation against the Levensons in which Pinsky was their attorney of record.

Now, looking to paragraph 2. "Sometime prior to March, 1971, plaintiff I. M. Molever, acting in his own be- [190] half, retained defendant Stanley B. Preiser to represent plaintiff Molever's interest in the defamation claim, part of the litigation referred to in Count 1 above. Said Attorney-Client contract was entered into in the State of Arizona while defendant Preiser was present in said state for the purpose of negotiating, procuring, and consumating said contract."

The only other reference we have as to times specifically is the defamatory letter of March, 1971. There is no other reference to a time, a date, or a place. So, whether there was a negligent failure to sue or whether there was an improper advice of counsel to dismiss a case that had been filed presumably on this letter, whether there was a negligent or improper refusal to amend the complaint so as to include allegations of the March, 1971 letter, we have solely and totally only March, 1971 as our time as to Count 2.

This also goes to the question of advising Molever that no separate action could be filed on the Pinsky letter. The time of the publication was March of 1971. The Court, I believe, could take judicial notice, of the fact that March of 1971 is a year and a month, it had 31 days in that month, so that is outside of our time limit. That is the outside of our time limit.

Now, as we have earlier noted in our amended complaint here, this was filed in April, April 13, 1977 with the [191] Clerk of the United States District Court for the District of Arizona. That amendment relates back to the original complaint, which was filed April 4, 1977, and that was with the same clerk and the same Federal Court in Arizona.

The date of the submission is April 4, 1977 by counsel for the plaintiffs in this case now before the Court.

So, as we take March 31, 1971, we apply the West Virginia one year Statute of Limitations to the defamation action and we find that March 31 of 1972 is the date in question. And then whether we use the Arizona four year Statute of Limitations or the West Virginia one year Statute of Limitations, we find that we are still short by four or five days of falling within the period of the limitation.

So Count 2 of the Complaint here must fail on the claim of being untimely. Also, it is not necessary perhaps to touch upon this, but it does not seem to satisfy the overviews of particularity that Professor Wright has ascribed to, and Professor Miller, as to more detail with regard to allegations of matters of this nature.

Now, let me turn next to the plaintiffs' motion to dismiss counter-claims. The defendant Preiser has sought in the first count of his counter claim to obtain attorney's fees in the sum of $298,066. Now I said Attorney fees; it says for expenses, fees and costs that they, the plaintiff and he had agreed to which were not paid. This has to do [192] with the contract.

The reply of the plaintiff on this matter is that the agreement does not satisfy the Statute of Frauds, it is without the Statute of Limitations, and it does not particularize who made the agreement and so forth and so on, or how the agreement was formalized. Those are good objections in the latter particular.

And while 12(b)(6) under that at least, there are obligations where proper and where possible to amend, the defendant will be—the defendant Preiser will be required to particularize his contentions of count 1 within 20 days.

Count 2 of the counterclaim that defendant Preiser has presented is one of malicious prosecution. The plaintiffs

say that this is premature and was premature; however, in light of the Court's ruling on the matter here today, this would breathe new life into the litigation of malicious prosecution and abuse of process.

On the third count of the claim of defendant Preiser, there are allegations that in this case that maligned the defendant, are untrue and so forth. The plaintiffs reply that pleadings and allegations in Court matters of this nature are given a privilege and that is true. The right of the individual in many instances must yield to the right of society under our system of law in order to get at the truth of the situation.

[193] So the portion that alleges defamation allegations in this civil action may be stricken. He goes on, however, and says that the plaintiffs knowingly published the libel contained in the lawsuit against this defendant, and did knowingly publish slanderous statements of and concerning this defendant to various and numerous persons charging negligence and fault against this defendant in the handling of litigation. That does not particularize the defamation in the degree that the stricture rules has indicated by Professor Wright seem to require and that seems to be the majority view.

However, in order that we may be able to reach the language of the malicious prosecution and defamation and to determine whether these are disfavored areas of litigation and so forth, the defendant will be required to replead with the needed particularity as to that portion of the claim that is outside, over and beyond the allegations that are here and now before the Court.

The defendant Brown has also filed a counter claim for fees. Again, the motion to dismiss goes to allegations of the failure to satisfy the statute of fraud and thus disabled, the Statute of Limitations is inapplicable and the failure to allege the debtor. In this case, I believe the Complaint does

allege that Molever contracted with the defendant Brown. So there does not seem to be a need to particu- [194] larize here.

I would refer us back to paragraph 4 of the answer. I mis-spoke when I said counter claim and that the defendant denies the allegations found in paragraph no. 4 of the plaintiffs' Complaint and affirmatively alleges that he was retained by I. M. Molever for the purposes of complying with the local rules of Court, United States District Court, Northern District of West Virginia and so forth. So that is the area that perhaps, by reference, would be enough to satisfy the pleading requirement.

As to the malicious prosecution, in view of the Court's ruling here today this now becomes a viable cause of action. The reply seems to raise a question of privilege. And apparently is directed towards the defendant Preiser's libel action because there is no defamation, libel and slander in Mr. Brown's cause of action. That is the only thing urged in the cause of action by Mr. Brown.

So, for bookkeeping purposes, we have motions by the defendants to require the plaintiffs to post bond and surety for costs and that will be denied. There are objections to the discovery by the defendants and perhaps there are some other motions that are pending by the plaintiffs in this matter. There is also the defendants' motions to stay discovery pending action on the motions to dismiss. All of these discovery efforts will now be terminated and stayed [195] at this time.

Also, discovery will start anew after the 20 days. For repleading these matters that remain in this litigation.

I will ask counsel for the defendants, since they have prevailed on the motions and are closer to this area, to prepare an appropriate order carrying forward all of these various rulings by the Court today and submit that to the Court for consideration and entry. I would have you send

to plaintiffs' counsel a copy of the order and if there are any objections to it, you can advise the Court.

All right. We will stand in recess for the time being.

(Whereupon, this matter came to a conclusion at this time.)

[114]

ORDER

On the 19th day of September, 1977, came the plaintiffs, by Charles D. Roush, their attorney, and came the defendant Stanley E. Preiser, by Edward W. Eardley, his attorney, and the defendant John F. Brown, Jr., by Herbert G. Underwood and James D. Gray, his attorneys, all pursuant to the respective motions of said defendants, which are:

1. Motions to dismiss in accordance with Rule 12(b) of the Federal Rules of Civil Procedure;

2. Motion to require security for costs;

3. Objections to the plaintiffs' motion for production of documents.

Thereupon, the Court heard argument upon the issues raised by the respective motions of said defendants to dismiss this civil action as to them, and the plaintiffs' resistance thereto, having heretofore reviewed the respective memoranda of law submitted by the parties hereto.

It appearing to the Court that the plaintiffs have alleged that defendants, by their counterclaims, have failed to state a cause of action against the plaintiffs, the Court is of opinion to consider such contention of the plaintiffs and the resistance of the respective defendants thereto as properly before the Court at this time.

After due consideration, the Court is of opinion to and does take judicial notice of the entire record of the "base litigation" herein, which is Civil Action No. 74-2-W, in the United States District Court for the Northern District of West Virginia, and the decision of the Court of Appeals [115] for the Fourth Circuit in *Molever et al.* v. *Levenson et al.*, Nos. 75-1107 and 75-1108, decided May 3, 1976, and by reason thereof hereby ORDERS the respective 12(b) motions of the defendants and the motions of the plaintiffs

to dismiss the counterclaims for failure to state a cause of action upon which relief can be granted, treated as motions for summary judgment in accordance with Rule 56 of the Federal Rules of Civil Procedure.

There being no genuine issue of material fact as between the plaintiffs and the defendants, and there being no just reason for delay, it is ORDERED that Count One of plaintiffs' amended complaint be dismissed for failure to state a cause of action upon which relief may be granted, and that Count Two of plaintiffs' amended complaint be dismissed upon a plea of the statute of limitations as to the defendant Stanley E. Preiser and for failure to state a cause of action upon which relief may be granted against the defendant John F. Brown, Jr., which dismissal is with prejudice, and to which the plaintiffs, by counsel, except.

It is further ORDERED that the plaintiffs' motions for summary judgment as they apply to the counterclaim of the defendant John F. Brown, Jr., are denied; that said motions insofar as they pertain to Count I and Count III of the counterclaim of the defendant Stanley E. Preiser are sustained, and said counts are dismissed, without prejudice, and with leave to amend Count I so as to specifically allege the party or parties with whom said defendant allegedly contracted with regard to the matters at issue herein and with leave to amend Count III so as to particularize the [116] nature of the alleged defamation; identify to whom publication was made and in all respects to satisfy the counterclaimant's obligation to plead precisely a claim for defamation.

It is further ORDERED that the motions of the respective defendants for security for costs is denied, and all other motions and objections as to discovery procedures are ORDERED overruled and denied, with all discovery procedures ORDERED suspended and stayed until the amendments authorized herein and the responses thereto have been filed.

It is further ORDERED that the opinion of this Court rendered on the 19th day of September, 1977, be transcribed and made a part of the record of this case and shall constitute this Court's findings of fact and conclusions of law.

ENTER: October 6th, 1977

/s/ ROBERT E. MAXWELL
Judge, United States District Court

Approved:

/s/ EDWARD W. EARDLEY
Attorney for Defendant Stanley E. Preiser

/s/ HERBERT G. UNDERWOOD
Attorney for Defendant John F. Brown, Jr.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest: Thomas F. Stafford
Clerk, U.S. District Court
Northern District of West Virginia

By: /s/ [Illegible]
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1034

MODERN MARTS, INC., a Pennsylvania Corporation; PITTSBURGH & WEST VIRGINIA INVESTMENT CO., a Pennsylvania Corporation; BETTY BERNSTEIN: SHIRLEY L. WEINBERGER, a Custodian; DON D. BROOKS; I. M. MOLEVER; and JEAN B. PARIS, *Appellants,*

v.

STANLEY E. PREISER; and JOHN F. BROWN, JR., *Appellees.*

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins.
Robert E. Maxwell, Chief Judge.

Argued December 6, 1978

Decided March 8, 1979

Before WINTER, RUSSELL and WIDENER, Circuit Judges.

Charles D. Roush (Francis G. Fleming, Treon, Warnicke, Dann & Roush, P.A. on brief) for Appellants; Herbert G. Underwood, Edward W. Eardley (Steptoe and Johnson on brief) for Appellees.

PER CURIAM:

For a first cause of action, plaintiffs collectively sued defendants for legal malpractice in a case in which we reversed a judgment obtained by plaintiffs, Molever v. Levenson, 539 F.2d 996 (4th Cir. 1976). For a second cause of action, plaintiff I. M. Molever sued defendant Stanley E. Preiser for legal malpractice in handling a suit for defamation which arose out of the litigation re-

ferred to in the first cause of action. The district court granted summary judgment for defendants in both causes of action, and plaintiffs appeal.* We affirm.

I.

Before proceeding to the merits, we treat two of plaintiffs' suggestions about the possible disqualifiaction of one or more of the members of the panel to hear this appeal. Plaintiffs have not formally moved for the disqualification of any member of the present panel, but in a letter from plaintiffs' counsel disqualification is suggested for two reasons: first, it is suggested that no judge who participated in the decision of Molever v. Levenson, *supra,* should sit in this case since this case concerns a claim of legal malpractice in the prior appeal, and second, counsel advises us that, in the course of discovery in the present case (while it was pending in the District of Arizona and before it was transferred to the Northern District of West Virginia where it was decided), defendants listed all of the judges of this court as witnesses for defendants.

We reject both suggestions that we are disqualified. With regard to participation in the previous appeal, we see no reason why, in a case of this nature, one who sat and decided a previous appeal is not fully competent to decide if there was legal malpractice in the representation in that appeal. A claim of legal malpractice raises issues about the competence and quality of representation by counsel, not the correctness of the decision in the prior appeal, the competence of the judicial participation, or the quality of the judicial result in the prior appeal.

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* One of the defendants, John F. Brown, Jr., counterclaimed for alleged malicious prosecution and for alleged abuse of process. When the instant appeal was taken, the counterclaim was undecided. However, the district court certified, pursuant to F. R. Civ. P. 54, that the summary judgments for defendants were final; hence this appeal is properly before us.

With regard to the listing of judges of this court as witnesses for the defendants, none of us has any knowledge of the case or the quality or competence of legal representation in the prior case which is not reflected by the record, the briefs and the tape of oral arguments in that case. Any claim of legal malpractice in the prior case must be based, *inter alia,* upon the record, briefs and arguments in that case and not upon any independent knowledge on our part, for in fact we have none. The suggestion that we are proper defense witnesses is legally frivolous. Under these circumstances, we decline to recognize the listing of us as witnesses as a ground for disqualification.

II.

In response to plaintiffs' amended complaint, defendants filed, *inter alia,* motions to dismiss pursuant to F. R. Civ. P. 12(b). When the 12(b) motions came on for decision, the district court took judicial notice of the record of the previous case, including the record of proceedings in this court, and treated the 12(b) motions as motions for summary judgment. It granted summary judgment for defendants as to the first cause of action since it found no merit in the claim. It also ruled that the second cause of action was barred by limitations as to defendant Preiser and so it entered summary judgment for him.

In this appeal, plaintiffs assign as reversible error that none of the parties asked the district court to take judicial notice of the prior case, that they were denied the opportunity to be heard as to the propriety of taking judicial notice of the record as granted by Evidence Rule 201(e), and that it was not proper for the district court to take judicial notice of the record in another case. They contend also that the district court improperly treated the 12(b) motions as motions for summary judgment, that they were denied the opportunity to demonstrate that

material facts were disputed, and that the record does not show that judgment should be entered against them.

We see no error in the district court's taking judicial notice of the entire record of proceedings in the previous case. Evidence Rule 201(c) and (f) authorizes the district court to take judicial notice on its own motion at any stage of the proceedings. It is sufficient that a judicially noticed fact is one "not subject to reasonable dispute in that it is • • • capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Evidence Rule 201(b). Certainly the trial record and appellate decision noticed by the district court satisfied this requirement. While the "opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed" was not afforded *before* notice was taken, plaintiffs were given full opportunity at a subsequent hearing to voice any objections to the notice, but they failed to appear. Evidence Rule 201(e) states that the opportunity to be heard may be given *after* judicial notice has been taken. We see no procedural or substantive error under Evidence Rule 201.

We also see no impropriety in the district court's treating the 12(b) motions as motions for summary judgment. Notice that the district court would consider the 12(b) motions as motions for summary judgment was given at the hearing, although it must be conceded that little opportunity was given either party to present additional material before the court concluded to grant summary judgment. This procedural irregularity was not prejudicial, however, because the district court specifically invited objections from plaintiffs to the grant of summary judgment and the district court entertained two motions for reconsideration which were supported by an affidavit. The affidavit included no material indicating that the summary judgment granted was improper.

On the merits, we think that defendants were entitled to summary judgment as to plaintiffs' first cause of action. The record of the proceedings in the district court and in the appeal in the previous case discloses to us no evidence of legal malpractice sufficient to entitle plaintiffs to a trial or to a verdict. While plaintiffs make general allegations that defendants negligently failed to adduce evidence which was available to them and which would have supported plaintiffs' recovery in the first trial, plaintiffs, in spite of having been given ample opportunity to do so, have failed to demonstrate what those facts are. We therefore cannot consider them, and absent such specifications sufficient to show a genuine dispute as to a material fact, we agree with the district court that defendants were entitled to summary judgment.

III.

As to the claim of malpractice in the handling of the defamation suit arising out of the past litigation, we again agree with the district court and conclude that it was barred by limitations, so that defendant Preiser was entitled to judgment as a matter of law.

Plaintiff Molever charges that defendant Preiser was negligent and in breach of his contract of employment in failing to prosecute a defamation action by reason of the publication in March 1971 of a defamatory letter and in advising plaintiff that no action could be filed. The alleged defamation occurred in West Virginia and the parties do not dispute that it was barred by limitations as of April 1, 1972. Molever's claim for malpractice and breach of contract arose on that date.

The instant case was filed on April 4, 1977 in the District of Arizona and subsequently transferred to the Northern District of West Virginia. Van Dusen v. Barrack, 376 U.S. 612 (1964), holds that the transferee (West

Virginia) must apply the law of the transferor (Arizona). Plaintiff concedes that Arizona would apply its own statute of limitations, and that it is four years. It follows that Molever's claim against Preiser was barred by limitations on and after April 1, 1976, and more specifically that it was stale when the instant case was filed on April 4, 1977.

AFFIRMED.

APPENDIX B

[13]

AMENDED COMPLAINT

For their complaint against defendants, plaintiffs allege as follows:

Count One

1. Plaintiffs Modern Marts, Inc. and Pittsburgh & West Virginia Investment Co. are corporations incorporated under the laws of the State of Pennsylvania and have their principal places of business in the State of Arizona. Plaintiff Betty Bernstein is a citizen of the State of Florida. Plaintiff Shirley L. Weinberger, Custodian, is a citizen of the State of Pennsylvania. Plaintiffs Don D. Brooks and I. M. Molever are citizens of the State of Arizona. Plaintiff Jean C. Paris is a citizen of the State of California.

2. Defendants Stanley E. Preiser and John F. Brown, Jr. are citizens and residents of the State of West Virginia who have caused acts or events to occur within the State of Arizona out of which plaintiffs' complaint arises.

3. The matter in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs.

4. In or about December, 1971, plaintiff I. M. Molever, acting in his own behalf and on behalf of the other plaintiffs, retained defendants to represent plaintiffs' interests in certain litigation, pending and to be brought, which was subsequently consolidated for trial in the United States District Court for the Northern District of West Virginia, [14] Civil Action No. 74-2-W. Said attorney-client contract was entered into in the State of Arizona while defendants were present in said State for the purpose of negotiating, procuring and consummating said contract.

5. The defendants held themselves out to plaintiffs as specialists and experts in litigation and appeals, and agreed, both orally and in writing, to use that degree of expertise, skill and knowledge ordinarily used by attorneys

specializing in such fields, in order to properly and fully represent plaintiffs' interests. Plaintiffs relied completely upon defendants' representations in entrusting their claims and representations to the defendants.

6. Plaintiffs' consolidated claims were tried in the United States District Court for the Northern District of West Virginia commencing in April, 1974. The jury returned verdicts in favor of plaintiffs on all claims and awarded plaintiffs damages in the amount of $5,033,016. Formal judgment on the verdicts was entered on May 21, 1974. Thereafter, however, and by virtue of subsequent rulings by the trial judge and by the appellate court, all of the verdicts and judgments in plaintiffs' favor were vacated or reversed, leaving plaintiffs nothing except substantial indebtedness for legal fees and costs.

7. Defendants breached the expressed and implied terms and conditions of their contracts with plaintiffs and further breached the duties owed to the plaintiffs as clients by failing to exercise the requisite degree of expertise, skill and knowledge ordinarily possessed and used by attorneys practicing such specialties during said proceedings, or to effectively [15] represent the plaintiffs at all in certain aspects of the trial and in the post-trial and appellate proceedings following judgment.

8. Said breaches of contract and negligence proximately resulted in the post-trial and appeal rulings referred to above, which rulings vacated or reversed plaintiffs' substantial awards of damages. Said conduct and omissions also proximately resulted in plaintiffs' having to incur substantial additional legal fees and costs.

9. Since this action arises in part out of contract, plaintiffs are entitled to an award of reasonable attorneys' fees under the provisions of Arizona Revised Statutes, Section 12-341.01. Plaintiffs request leave of the Court to allege and prove such attorneys' fees at the conclusion of proceedings on this complaint.

WHEREFORE, plaintiffs pray for judgment against the defendants on Count One as follows:

A. Damages in the amount of $5,033,016, the jury verdict referred to in Paragraph 6, with interest thereon at the maximum legal rate from May 21, 1974, until paid.

B. For such sums as are necessary to compensate plaintiffs for the additional legal fees and costs proximately resulting from defendants' conduct and omissions aforesaid, with interest thereon at the maximum legal rate from the date of judgment until paid.

C. For plaintiffs' reasonable attorneys' fees incurred in this proceeding, with interest thereon at the maximum legal rate from the date of judgment until paid.

D. For plaintiffs' costs of this proceeding, with [16] interest thereon at the maximum legal rate from the date of judgment until paid.

E. For such other relief as the Court may deem necessary or appropriate under the circumstances of the case.

Count Two

1. Plaintiff I. M. Molever incorporates herein, as through set forth here in full, paragraphs one through six, inclusive, of Count One.

2. Sometime prior to March, 1971, plaintiff I. M. Molever, acting in his own behalf, retained defendant Stanley E. Preiser to represent plaintiffs Molever's interests in the dafamation claim, part of the litigation referred to in Count One above. Said attorney-client contract was entered into in the State of Arizona while defendant Preiser was present in said State for the purpose of negotiating, procuring and consummating said contract.

3. During the pendency of plaintiff Molever's defamation claim in the United States District Court for the

Northern District of West Virginia, the attorney and agent for the defendants Levenson, one Abraham Pinsky, of Wheeling, West Virginia, published a letter to at least two newspapers with national circulation, the Los Angeles Times and The Washington Post, and to two separate committees of the United States Congress, which letter defamed plaintiff Molever and caused him substantial damages. Said letter was written during the pendency of the suit against the Levensons in which Pinsky was their attorney of record.

[17] 4. Defendant Preiser thereafter agreed to file and prosecute the appropriate damage action against Pinsky and the Levensons, but negligently failed and refused to do so within the time prescribed by the applicable statute of limitations. Furthermore, the defendant advised and prevailed upon plaintiff to dismiss a complaint for damages for defamation that had previously been filed against said Pinsky and refused to amend the complaint in said proceeding to seek damages for the defamatory letter of March, 1971. Defendant also negligently advised plaintiff that no separate action could be filed seeking damages for the Pinsky letter. Plaintiff's causes of action against Pinsky have been forever barred by the applicable statute of limitations. Plaintiff's causes of action aforesaid had a reasonable damage value of at least one million dollars, compensatory and punitive damages.

5. The defendant held himself out to plaintiff as a specialist and expert in litigation of this nature, and agreed, both orally and in writing, to use that degree of expertise, skill and knowledge ordinarily used by attorneys specializing in such fields, in order to properly and fully represent plaintiff's interest. Plaintiff relied completely upon defendant's representation in entrusting his potential claims to the defendant. Defendant continued to represent plaintiff in this regard until at least January, 1977, when the parties terminated their relationship.

6. Defendant breached the expressed and implied terms and conditions of his contract with plaintiff and further breached the duty owed to plaintiff as client by failing to exercise the requisite degree of expertise, skill, perserverance [18] and knowledge ordinarily possessed and used by attorneys practicing such specialties during said proceedings, or to represent the plaintiff at all in connection with the claims defendant repeatedly promised and represented he would file, but which he never did file.

7. Said breaches of contract and negligence proximately resulted in plaintiff's claims being forever barred by the applicable statute of limitations, thereby resulting in the irretrievable loss to plaintiff of the damage value of said claims.

8. Since this action arises in part out of contract, plaintiff is entitled to an award of reasonable attorneys' fees under the provisions of Arizona Revised Statutes, Section 12-341.01. Plaintiff requests leave of the Court to allege and prove such attorneys' fees at the conclusion of proceedings on this Complaint.

WHEREFORE, plaintiff I. M. Molever prays for judgment against defendant Preiser on Count Two as follows:

A. Damages in the amount of one million dollars, with interest thereon at the maximum legal rate from the date of judgment until paid.

B. For plaintiff's reasonable attorneys' fees incurred in this proceeding, with interest thereon at the maximum legal rate from the date of judgment until paid.

C. For plaintiff's costs of this proceeding, with interest thereon at the maximum legal rate from the date of judgment until paid.

D. For such other and further relief as the Court may deem necessary or appropriate under the circumstances of the case.

[19] Dated this 13th day of April, 1977.

Treon, Warnicke, Dann & Roush, P.A.

By /s/ Charles D. Roush
Charles D. Roush

By /s/ B. Michael Dann
B. Michael Dann
Attorneys for Plaintiffs

[20]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 77-290 Phx. WPC

I. M. Molever, et al., *Plaintiff*,

vs.

Stanley E. Preiser, et al., *Defendant*.

Date: June 21, 1977

ORDER

Defendants have filed a motion to dismiss or in the alternative, for change of venue. For lack of personal jurisdiction over defendants and as an alternative ground, pursuant to 28 U.S.C. § 1404(a),

It Is Ordered:

1. The motion to dismiss is denied.

2. The alternative motion is granted and this case is hereby transferred to the United States District Court for the Northern District of West Virginia for all further proceedings.

/s/ Wm. P. Copple
Wm. P. Copple
United States District Judge

Mailed this 21st day of June, 1977, to:

Treon Warnicke Dann & Roush
Jennings Strouss & Salmon

[37]

MOTION TO DISMISS ON BEHALF OF THE DEFENDANT JOHN F. BROWN, JR.

Defendant John F. Brown, Jr., in accordance with Rule 12(b) of the Federal Rules of Civil Procedure, moves the Court for an order dismissing him from this civil action for the plaintiffs' failure to allege a cause of action against this defendant upon which relief can be granted, on the following grounds:

1. Plaintiffs have failed to allege any acts, either of omission or commission on the part of this defendant, which proximately caused or proximately contributed to their alleged damages.

2. The plaintiffs have failed to allege any acts, either of omission or commission on the part of this defendant, which, if performed or omitted, would have altered or changed the results of Civil Action 74-2-W in the United States District Court for the Northern District of West Virginia; the result of the post-trial activity incident to that civil action or the appeal thereof to the United States Court of Appeals for the Fourth Circuit.

3. The corporate plaintiffs are not legal entities.

4. Plaintiffs' alleged cause of action is premature insofar as it pertains to the "Dennis Line Loans" which were a part of the stockholders' derivative action within Civil Action 74-2-W, as that claim remains upon the docket of the United States District Court for the Northern District of West Virginia, having been remanded for a new trial by United States Court of Appeals for the Fourth Circuit.

[38] 5. The plaintiff Molever was not a party to the stockholders' derivative action which was a part of Civil Action 74-2-W in the United States District Court for the Northern District of West Virginia.

6. The plaintiffs' complaint seeks damages for alleged errors of judgment in the conduct of trial, post-trial procedures and appellate procedures, which are not compensable at law.

7. The plaintiffs are barred by the applicable statute of limitations in that their complaint was not filed in the United States District Court for the District of Arizona within a one-year period immediately following the accrual of their alleged cause of action.

8. The plaintiffs are barred by the applicable statute of limitations in that their complaint was not filed in the United States District Court for the District of Arizona within a two-year period immediately following the accrual of their alleged cause of action.

Dated this 1st day of July, 1977.

/s/ Herbert G. Underwood
Herbert G. Underwood
Union Bank Building
Clarksburg, W. Va. 26301

Attorney for Defendant John F. Brown, Jr.

Steptoe & Johnson
Clarksburg, W. Va.

Of Counsel

[39]

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of July, 1977, I served the foregoing Motion to Dismiss on Behalf of the Defendant John F. Brown, Jr., upon Charles D. Roush and B. Michael Dann of Treon, Warnicke, Dann & Roush, P.A., attorneys of record for the plaintiffs, and upon Edward W. Eardley, attorney for defendant Stanley E. Preiser, by depositing true copies thereof in the United States mail, postage prepaid, in envelopes addressed to them at 100 West Washington, Suite 2250, Phoenix, Arizona, 85003, and at Post Office Box 1588, Charleston, West Virginia, respectively.

/s/ HERBERT G. UNDERWOOD
Herbert G. Underwood

[40]

AMENDED MOTION TO DISMISS

The defendant Stanley E. Preiser, by Edward W. Eardley, his attorney, hereby moves the Court to dismiss this action for the following reasons:

1. The allegations of the amended complaint are so vague and involve conclusions of law and fail to state any factual basis for a cause of action.

2. The alleged causes of action set forth in the amended complaint herein are barred by the applicable statutes of limitations of the States of Arizona and West Virginia.

3. The corporate plaintiffs are no longer in existence and therefore cannot assert any cause of action herein.

4. The individual plaintiffs have no cause of action as individuals with respect to the handling of the derivative stockholders action referred to in the amended complaint.

5. These plaintiffs have not actually suffered any damages of a recoverable nature because the litigation in question is still pending and their complaints, if any, are premature.

6. The plaintiffs have failed to allege what act or acts this defendant did or failed to do that would have produced a different result either at the trial or post-trial or on appeal.

[41] 7. The plaintiffs have failed to state that the result of the trial or appeal would have been different had this defendant performed or failed to perform certain acts.

8. No cause of action for negligence will lie against a lawyer for trial of a case for matters of judgment as is alleged in the amended complaint, nor does any cause of

action lie against any lawyer for post-trial or appellate conduct as long as appellate requirements are met.

/s/ EDWARD W. EARDLEY
Edward W. Eardley

Attorney for Defendant,
Stanley E. Preiser

STEPTOE & JOHNSON
P. O. Box 1588
Charleston, West Virginia 25326

Of Counsel

Supreme Court, U. S.
FILED
AUG 13 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-235

I. M. MOLEVER; MODERN MARTS, INC., a Pennsylvania Corporation; PITTSBURGH AND WEST VIRGINIA INVESTMENT COMPANY, a Pennsylvania Corporation; BETTY BERNSTEIN; SHIRLEY L. WEINBERGER, as Custodian; DON D. BROOKS; and JEAN C. PARIS

Petitioners,

v.

STANLEY E. PREISER and JOHN F. BROWN, JR.,

Respondents.

BRIEF OF RESPONDENTS, STANLEY E. PREISER AND JOHN F. BROWN, JR., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CHARLES W. YEAGER
Post Office Box 2190
Clarksburg, W. Va. 26301

Attorney for Respondents

Of Counsel:

HERBERT G. UNDERWOOD
EDWARD W. EARDLEY
STEPTOE & JOHNSON
Clarksburg, W. Va. 26301

PRESS OF BYRON S. ADAMS, INC., WASHINGTON, D.C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

I. M. MOLEVER; MODERN MARTS, INC., a Pennsylvania Corporation; PITTSBURGH AND WEST VIRGINIA INVESTMENT COMPANY, a Pennsylvania Corporation; BETTY BERNSTEIN; SHIRLEY L. WEINBERGER, as Custodian; DON D. BROOKS; and JEAN C. PARIS

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STANLEY E. PREISER and JOHN F. BROWN, JR.,

Respondents.

BRIEF OF RESPONDENTS, STANLEY E. PREISER AND JOHN F. BROWN, JR., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Counter Statement of Questions Presented

1. Whether in granting summary judgment, the court below properly took judicial notice of the record in prior proceedings in that court?

2. Whether the petitioners were given an opportunity to supply evidence of the existence of a genuine issue of material fact upon conversion of a Rule 12(b) motion to a Rule 56 motion by the trial court?

3. Whether the decision of the appellate court below constituted an unsanctioned departure from the accepted and usual course of judicial proceedings as to require the exercise of this Court's power of supervision?

Counter Statement of the Case

The seemingly endless history of this unique litigation begins with the filing of complaints in the United States District Court for the Northern District of West Virginia on behalf of I. M. Molever and others by attorneys other than the respondents herein, seeking damages for transactions occurring in the internal economy of the Bank of Wheeling, West Virginia, occurring in 1963-1968. *Molever* v. *Levenson*, 539 F.2d 996, 998 (4th Cir. 1976).[1]

Three civil actions were consolidated for trial, and they have been characterized as follows:

(1) An action under §10(b) of the Securities Exchange Act of 1934, and Securities and Exchange Commission Rule 10b-5 filed by one of the present petitioners, Molever, in 1970 (hereinafter Case I);

(2) A shareholders' derivative action filed in 1968 by the present petitioners, other than Molever (hereinafter Cases II(a) and II(b));

[1] The petitioners in the present litigation were the plaintiffs in *Molever* v. *Levenson;* the respondents were their attorneys at trial and upon appeal.

(3) A defamation action filed by one of the present petitioners, Molever, in 1967 (hereinafter Case III).

Following is a brief summary of the trial court results and the decision of the United States Court of Appeals in what is characterized as the "base litigation."

Case I: Action under §10(b) of the Securities Exchange Act of 1934.

District Court: Judgment for $59,496.00 in favor of one of the present petitioners.

Fourth Circuit: Judgment reversed and vacated.

Case II: (a) Shareholders' derivative action based on an alleged fraudulent "floor plan."

District Court: Judgment for $23,520.00 compensatory and $1,000,000.00 punitive damages against the then defendants.

Fourth Circuit: Judgment reversed with judgment entered for the then appellants.

(b) Shareholders' derivative action relating to the "Dennis Line Loans."

District Court: Judgment for $600,000.00 compensatory and $100,000.00 punitive damages against the then defendants.

Fourth Circuit: Judgment vacated and a new trial ordered thereon.

Case III: Defamation action by one of the present petitioners, Molever, against Robert and Donald Levenson, Abraham Pinsky and Joseph Gompers.

District Court: Verdict for plaintiff Molever against defendants Levensons, set aside; judgment n.o.v. entered for the then defendants only.

Fourth Circuit: Affirmed.

Subsequent to the adverse decision of the Court of Appeals, the petitioners herein filed their complaint against the respondents, Preiser and Brown, in the United States District Court for the District of Arizona, seeking as damages the amount of the jury verdicts rendered in the United States District Court for the Northern District of West Virginia, which were in excess of $5,000,000.00, together with damages for an alleged failure or refusal to file a defamation action against Abraham Pinsky, a member of the West Virginia Bar.

Upon the defendants' motion, the case was transferred to the United States District Court for the Northern District of West Virginia for all further proceedings, where the defendants filed 12(b) motions seeking dismissal, together with their respective answers and counterclaims.

The issues raised by the respective motions to dismiss were briefed and argued in the District Court on September 19, 1977, and at the hearing the District Court took judicial notice of the "base litigation," including the appeal therefrom to the United States Court of Appeals for the Fourth Circuit, the decision in which is reported at 539 F.2d 996 (4th Cir. 1976); converted the motions to dismiss to summary judgment motions, as authorized by Rule 12 F.R.C.P., and ordered the plaintiffs' action dismissed. The dismissal of Count I of the complaint was based upon a failure to state a cause of action upon which relief could be

granted; the dismissal of Count II of the complaint was based upon the applicable statutes of limitations.

Prior to the entry of the judgment order, the plaintiffs filed a factually unsupported motion for reconsideration under Rule 59, and a second factually unsupported motion for reconsideration was filed after the judgment order was entered.

The separate motions for reconsideration were accompanied by Memoranda of Points and Law, wherein the plaintiffs contended that they were "surprised" by the conversion to summary judgment.

Despite the alleged simplicity of the plaintiffs' position, it is of utmost significance that from September 19, 1977 (the date of the argument in the District Court), until December 14, 1977 (the date scheduled for argument upon the separate motions to reconsider)[2] petitioners made no effort to present to the District Court any evidence to support their contentions that there were material issues of fact which required jury determination.

The record in this case available to the District Court prior to December 14, 1977, was the entire record of the base litigation, which had been judicially noticed, and the conclusory affidavit of the plaintiff I. M. Molever, who, as a layman, advanced his conclusions that the defendant lawyers were negligent.

The significance of the abject failure of the plaintiffs to furnish the District Court with evidence of their far-reaching contentions contained in legal mem-

[2] As discussed hereinafter, the plaintiffs failed to appear for the scheduled argument either in person or by Arizona or local counsel.

oranda is heightened by the fact that the plaintiffs were advised of the hearing to be held upon the pending motions on December 14, 1977, by letter from the Clerk of the District Court dated October 31, 1977, which was after the plaintiffs had served and filed two motions for reconsideration of the District Court's order granting summary judgment (Respondents' Appendix B).[3]

The cavalier attitude of the plaintiffs toward the District Court, and, indeed, toward their motions for reconsideration, is reflected by the preamble to the mailgram-affidavit signed by I. M. Molever and tendered on behalf of the plaintiffs by Arizona counsel on the day of the hearing of the motions for reconsideration, which was:

> "In view of the foregoing, I called your secretary this morning and requested a continuance of the hearing on Plaintiffs' Motions now set for December 14, 1977 for two reasons: (1) In order that plaintiffs could thoroughly comply with your order of December 6, 1977 and (2) in order that someone from our firm could travel from Arizona to West Virginia in order to appear to argue the motions. Although I have contacted three other law firms in West Virginia in attempt to obtain counsel to appear on Plaintiffs' behalf tomorrow, no local counsel has been willing to make the appearance."

There is absolutely no question that the petitioners had been advised of the hearing on all pending motions by the letter dated October 31, 1977, yet their attorneys, one day prior to the long-scheduled hearing

[3] The letter provided in part: "This is to advise you that Judge Maxwell has scheduled a hearing on pending motions in the above-styled civil action on December 14, 1977, at 1:30 p.m. in the U. S. Courtroom in Wheeling, West Virginia."

upon their motions, sought a continuance "in order that someone from our firm could travel from Arizona to West Virginia in order to appear and argue the motions."

Despite their Rule 59 motions; despite the hearing on all pending motions scheduled by letter dated October 31, 1977; despite a period from September 19, 1977, to December 14, 1977, within which to demonstrate to the District Court genuine issues of material fact, the petitioners furnished no expert's affidavit demonstrating such issues nor have they identified any documentary exhibits which should have been admitted in the base litigation to support their allegations of material issues of fact. The only material filed in support of the plaintiffs' position is the affidavit of I. M. Molever, who concludes his lay dissertation on the practice of law and appellate procedure as follows:

> "4. Alternatively, in the event that it is determined that plaintiffs in fact had no claim against the defendants Levenson, et al. and defendants' negligence did not deprive plaintiffs of their remedies, such as, for example, because the release executed by the Bank of Wheeling in favor of the Levensons was valid notwithstanding the presumption of invalidity which defendants failed to adequately assert, affiant will prove that defendants were negligent in that the advice they gave plaintiffs to finance and continue the base litigation was negligently tendered and relied upon."

The courts below properly concluded that, absent any proper demonstration of material issues of fact, the motions for reconsideration should be and were properly denied.

Reasons for Denying the Writ

The District Court Properly Converted 12(b) Motions to Rule 56 Motions and Gave the Petitioners Opportunity to Supply Evidence.

The respondents filed separate Rule 12(b) motions (44a, 37a)[4] and at a hearing before the District Judge on September 19, 1977, those motions were converted to summary judgment motions (2a-26a) and a judgment order entered October 6, 1977 (27a).

In the course of the argument before the District Judge, counsel for the petitioners referred to summary judgment as being the best method for testing a claim (7a) and, after referring counsel to the right of all parties to a reasonable opportunity to present all material made pertinent to such a motion by Rule 56, the District Court directed preparation of a judgment order reflecting the granting of summary judgment for the respondents.

The only action taken by the petitioners subsequent to the argument of September 19, 1977, up until the date of a hearing scheduled for December 14, 1977, was to file two factually unsupported motions "pursuant to Rule 59, Federal Rules of Civil Procedure" (Respondents' Appendix A) seeking reconsideration of the District Court's granting of summary judgment.

[4] References designated (a) are to petitioners' Appendix.

The plaintiffs' pre-judgment motion was accompanied by a Memorandum Of Points And Law, which presented the argument:

> "Specifically, for examples, this Court, in the base litigation, entered a Judgment N.O.V. with respect to the jury award of damages for defamation. One of the Court's stated reasons for granting Judgment N.O.V. was that the evidence adduced at trial failed to show an abuse of privilege on the part of the defamation defendants. It is simply plaintiffs' position with respect to this decision of the Court that material evidence existed which abundantly showed abuse of privilege, but that defendant Preiser was so ill-informed regarding the law of defamation that he failed to recognize the significance of this evidence and that he improperly failed to introduce this evidence into the record. Similarly, it is plaintiffs' position that defendants inadequately argued to the Court those aspects of the proof of abuse of privilege which were indeed in the record and were sufficient to sustain the jury verdict, and the case law which supports its adequacy, all of which if properly performed would have effected this Court's ruling on the motion. This is the substance of plaintiffs' claims of malpractice, and plaintiffs are entitled to have a jury consider their merits."

No affidavit or proffer of any sworn testimony was made or served with the motion or the memorandum in support thereof which was served prior to the entry of the judgment order by the District Court on October 6, 1977.[5] Following the entry of the judgment order by the District Court, the plaintiffs served a

[5] The order resulted from the hearing of September 19, 1978.

second motion for reconsideration, dated October 20, 1977, which was again accompanied by a Memorandum Of Points And Authorities which referred to the earlier memorandum which was incorporated by reference. Again, however, no affidavit accompanied the motion, and no proffer of evidence to create a factual issue was made.

With regard to Rule 59(e), F.R.P.C., *Moore, Federal Practice*, §59.12(3) provides at page 59-253:

> "[3]—Serving Affidavits Pertaining to 59(e) Motions.
>
> "Rule 59(c) deals specially with the service of affidavits in connection with a motion for new trial. There is no comparable provision relative to a motion to alter or amend a judgment under 59(e). If, therefore, a party desires to support or oppose such a motion by affidavits, service should be in accordance with the general provisions of Rule 6(d)."

Apparently content to rest upon their two unsupported motions for reconsideration despite notice to the petitioners by letter from the District Court dated October 31, 1977, of a hearing scheduled for December 14, 1977 (Respondents Appendix B), the petitioners took absolutely no action to support their contention that genuine issues of material fact existed until receipt of the District Court's order of December 6, 1977 (Respondents' Appendix B), which *suggested* that the plaintiffs should be prepared to present their alleged factual issues at the hearing scheduled since October 31, 1977, 36 days prior to the entry of the order of December 6, 1977, and 44 days prior to the scheduled hearing date.

What the plaintiffs did undertake to do, however, was prepare an affidavit for execution by I. M. Molever, one of the petitioners herein, and transmitted that affidavit for receipt by the District Court prior to the hearing of December 14, 1977. No appearance at the hearing was made on behalf of the petitioners by their Arizona attorneys or by local counsel of record. The Molever affidavit was made a part of the record (Respondents' Appendix C).

It is clear that the petitioners slept upon their right to present facts which would have required the District Court to give consideration of their motions for reconsideration of the judgment. With admitted notice of the date and time of the hearing, with constant reference to surprise and the availability of "facts" to demonstrate a genuine issue of material fact, nothing was done by the petitioners. Rule 59 is clear. Petitioners exercised their right to use that vehicle to bring to the District Court's attention its alleged error. No factual issues were presented within the 86-day period from September 19, 1977, until December 14, 1977, despite the obvious willingness of the District Court to accept any meaningful evidence which would demonstrate an issue of fact.

The utter irresponsibility of the petitioners with regard to the Rule 59 F.R.C.P. motions is demonstrated by the record of the December 14, 1977, hearing. There the District Court stated:

> "We are sitting here now on December 14th, and we are talking about virtually ninety days and plaintiff's counsel have not come forward with any Rule 56 materials; they just haven't come forward with anything." (Respondents' Appendix B)

The petitioners made no effort to meet their burden to demonstrate genuine issues of material fact. They never had any intention of doing so and they had no intention of appearing at the hearing of December 14, 1977.

Certain allegations by the petitioners which are contained in their brief and which have appeared in one form or another throughout this litigation are deserving of comment.

Allegation

"The complaint was filed in the United States District Court for the District of Arizona—Molever's home and the locale of the original contract to render legal services." (Petitioners' Brief, p. 5)

Fact

The contract for legal services was entered into in the State of West Virginia.

Allegation

"[T]he District Court advised counsel that it would then take judicial notice of the entire earlier trial proceedings and the appeal to the Fourth Circuit (which materials were not and could not have been before the court) * * *" (Petitioners' Brief, p. 6)

Fact

Certainly the judicially noticed record and the appellate decision are sources whose accuracy cannot reasonably be questioned. [Evidence Rule 201(b)] and that is what is required by the Federal Rules of Evidence.

Allegation

"Plaintiffs requested the court to reconsider its ruling and to permit evidence on the issues of neglect, but the request was denied." (Petitioners' Brief, p. 7)

Fact

No proffer of any admissible factual evidence was ever made by the petitioners so as to create any issue of fact as to legal malpractice.

Allegation

The petitioners were given no opportunity to object to judicial notice by the District Court. (Petitioners' Brief, p. 8)

Fact

Ample opportunity *after* judicial notice was taken, was given the petitioners to object or to furnish a factual basis for contesting the propriety of judicial notice.

Allegation

The District Court substituted itself for the jury—substituted its opinion for those of properly qualified experts. (Petitioners' Brief, p. 8)

Fact

The petitioners tendered no expert opinion by affidavit or otherwise.

Allegation

The respondents totally failed to brief the issue of "known falsity" with regard to the defamation issue and did not brief, argue or refer to matters of "embellishment." (Petitioners' Brief, p. 15)

Fact

The defamation issue, in the base litigation, was the subject of an order for judgment for the respondents n.o.v. The issues were extensively briefed to the District Court and the Court of Appeals. No expert opinion as to the effect of such alleged failure was tendered.[6]

Allegation

"[T]he respondent lawyers admitted to Molever, that they never read the trial transcript in preparing the appeal." (Petitoners' Brief, p. 15)

Fact

This is simply not true and cannot serve by any stretch of imagination to create an issue of fact by its insertion in a self-serving affidavit filed in a vindictive effort to obtain satisfaction from the very lawyers who had obtained a judgment in the first instance in excess of five million dollars.

The District Court's Judicial Notice was Proper.

In the course of rendering its oral opinion, which was incorporated as its findings of fact and conclusions of law, the District Court took judicial notice of the "base litigation" and the decision of the Court of Appeals upon the appeal from the "base litigation."

> "So there we have a very interesting procedural undertaking in this case where both parties have resorted to a base case, we will call it, our Civil Action No. 74-2-W. That record, of course, is before the Court with all of the pleadings and with all of the exhibits and with all of the rulings

[6] See pp. 46-48 of respondents' brief in the appellate court below.

> and the 4500 pages of transcript. We have that entire record here and indeed, it seems that it is incumbent upon the Court in a matter of this nature, to judicially notice such a record since it is so intimately involved with the litigation that we have at hand.
>
> "Also, the Court must at least take judicial notice of the appellate record of the base case which was the entire record at the Court of Appeals for the Fourth Circuit. The Court with or without judicial notice is bound as is the law of the land, to obey that decision that came down from that appeal.
>
> "Let me now make a reference to that at this time and this is Molever v. Levenson and it is reported in 539 Federal Reporter, 2nd, 996. So, we have those matters and they are in this case." (Appendix, 11a)

The Petitioners made the "base litigation" and the appeal therefrom the predicate for their cause of action. The propriety of utilization of previous litigation in the same court by a court in a summary judgment proceeding is clear. "We are cognizant of the general rule which permits judicial notice of a court's prior cases to support a motion for summary judgment." *Soley* v. *Star & Herald Company,* 390 F.2d 364 (5th Cir. 1968).

Granted, in *Soley,* the Court of Appeals reversed a summary judgment, but in doing so pointed out that the District Court had not informed the parties as to what portion of the record it was judicially noticing. Such is not the case here. The Court, quite properly, took judicial notice of the entire record in the "base

litigation" as well as the decision of this Court upon appeal from that base litigation.

> "The controlling question raised on this appeal is whether the lower court, on a motion made for summary judgment, and in determining that there is no genuine issue as to any material fact, can take judicial notice of its own records in concluding the issue thus raised.
>
> "We take this to be too well settled to be seriously questioned." *Fletcher* v. *Evening Star Newspaper Co.*, 133 F.2d 395 (C.A.D.C. 1942) cert. denied 319 U.S. 755 (1943)

In *Ellis* v. *Cates*, 178 F.2d 791 (4th Cir. 1949), cert. denied 339 U.S. 1964 (1950), the appellate court had before it the question of the propriety of a refusal by a District Court to enter summary judgment on the plaintiff's motion when, in denying the motion, the District Court took judicial notice of proceedings had in prior litigation. The Court of Appeals approved the action of the District Court and stated at page 793:

> "The plaintiff argues that the court could not look to the record in the prior litigation in support of the motion for summary judgment; but we think there can be no question as to the correctness of the court's action in doing so. As we said in Morse v. Lewis, 4 Cir., 54 F.2d 1027, 1029:
>
> "'The general rule undoubtedly is that a court will not travel outside the record of the case before it in order to take notice of the proceedings in another case, even between the same parties and in the same court, unless the proceedings are put in evidence; and the rule is sometimes enforced with considerable strictness. * * * But in exceptional cases, as high authority shows, the dictates of logic will yield to the demands of justice, and the courts, in order to reach a just result, will make use of established and uncontroverted facts not formally of record in the pending litigation.'"

With regard to judicial notice and the propriety thereof, the Court stated in *Landy* v. *Federal Deposit Insurance Corporation*, 486 F.2d 139 (3rd Cir. 1973), at p. 151:

> "* * * In the case sub judice, the justification for taking judicial notice is even greater because the subsequent developments were in the very court in which this suit was instituted, in a related matter, and merely involved notice of the filing of the new action and the parties thereto. This situation is similar to Pittsburgh Newspaper Printing Pressman's Union v. Pittsburgh Press Co., 479 F.2d 607 (3d Cir. 1973), in which we took judicial notice of subsequent arbitration and proceedings in the court of appeals. We also note that rule 201(f) of the Proposed Rules of Evidence for United States Courts and Magistrates, as explained by the Advisory Committee's Note, provides that judicial notice may be taken at any stage of the proceeding, even on appeal. 56 F.R.D. 183, 206."

Finally, with regard to the issue of judicial notice, it is clear that 201(c) and (f) of the Federal Rules of Evidence authorize a court to take judicial notice on its own motion at any stage of the proceedings. Any alleged failure to afford an opportunity to object to the notice was cured by the opportunity to appear and object at the December 14, 1977, hearing, concerning which the petitioners were advised by letter dated October 31, 1977. (Respondents' Appendix B) The petitioners not only did not appear for the scheduled hearing, they sought a continuance in order to

permit travel from Arizona to West Virginia when they previously had knowledge of the hearing since approximately October 31, 1977.

There Was no Unsanctioned Departure from Established Procedure or Principles Which Requires Intervention by this Court.

As stated in the opinion of the Court of Appeals, any claim of legal malpractice in the prior case must be based, *inter alia*, upon the record, briefs and arguments in that case (32a). Those records, briefs and arguments of which proper judicial notice was taken and which served as a predicate for summary judgment went unchallenged by the petitioners at the District Court level.

No factual challenge to the propriety of summary judgment was interposed at the District Court level and, absent such a challenge, any alleged deprivation of Seventh Amendment right to trial by jury does not withstand scrutiny. Granted, the safeguards which prevent violation of the right to trail by jury in summary judgment procedures are (1) notice and (2) the opportunity to present contrary evidence. *Fountain* v. *Felson*, 366 U.S. 681 (1949), *Baylis* v. *Travelers Ins. Co.*, 113 U.S. 320 (1885). Here, petitioners ignored their right to file evidence demonstrating factual issues despite the filing of two motions seeking reconsideration by the District Court and even failed to appear at a hearing scheduled 45 days in advance. If the petitioners had evidence it would have been produced and, absent such evidence of genuine issues of material fact, the courts below did not permit any deviation from accepted practice.

Conclusion

Now is the time to terminate this lengthy litigation which began by the filing of a complaint on behalf of the petitioners as early as 1967. It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

CHARLES W. YEAGER
HERBERT G. UNDERWOOD
EDWARD W. EARDLEY

August , 1979

APPENDIX

Respondents' Appendix A

MOTION FOR RECONSIDERATION

Plaintiffs, by and through their counsel undersigned, hereby request the Court, pursuant to Rule 59, Federal Rules of Civil Procedure, to reconsider the entry of its Order dated October 6, 1977.

The attached Memorandum of Points and Authorities is submitted in support thereof.

DATED this 20th day of October, 1977.

TREON, WARNICKE, DANN & ROUSH, P.A.

By CHARLES D. ROUSH

Charles D. Roush
Francis G. Fleming
LaVerne Sweeney
Attorneys for Plaintiffs.

MOTION FOR RECONSIDERATION

Plaintiffs, by and through their counsel undersigned, hereby move the Court, pursuant to Rule 59, Federal Rules of Civil Procedure, to reconsider its decision to grant defendants summary judgment in the above-captioned matter. The attached Memorandum of Points and Law is submitted in support thereof.

Respectfully submitted this 30th day of September, 1977.

TREON, WARNICKE, DANN & ROUSH, P.A.

By CHARLES D. ROUSH

Charles D. Roush
Francis G. Fleming
Arthur G. Newman
Attorneys for Plaintiffs

Respondents' Appendix B

Whereupon, on the 14th day of December, 1977, in the U. S. District Courtroom in Wheeling WV, the above-styled matter came on for a hearing on motions and the following matters were had, to-wit:

PROCEEDINGS

THE COURT: In the matter of Modern Marts v. Stanley E. Preiser and John F. Brown, Jr., this being Civil Action No. 77-183-E, we will note the appearance of counsel for the Defendants and we will note no appearance by any of the counsel representing any of the Plaintiffs.

Just by way of filling out our record I would say that we had a telephone call yesterday which would have been the 13th of December, that counsel for Plaintiffs had not received this Court's order of an earlier date until that day. Later on however, we received some documents that had been sent out in response to that order, I think perhaps a day or two earlier than that. So, perhaps somebody might have misspoke in the telephone conversation and said, that they could not and would not be present.

Local counsel in this matter, Mr. LaVerne Sweeney, as we were informed by the Arizona counsel, was tied up, busy or something, and for some reason could not be here today either.

The Court had earlier ruled on several matters and the Plaintiffs were very insistent that the Court take up the motion for reconsideration. And this is the reason that we tried to schedule this matter and giving everybody ample opportunity to be present today.

Our correspondence file indicates that on October 31, 1977, a letter was addressed to Mr. Charles D. Roush, R-o-u-s-h, of Treon, Warnick, Damn & Roush, 100 West Washington, Suite 2250 Pheonix, Arizona and to Mr.

LaVerne Sweeney, 207 West Main Street, Grafton, West Virginia, William B. Birmingham, of Jennings, Strouss & Salmon, 111 West Monroe, Phoenix, Arizona. Also, a copy of this letter was forwarded to counsel for the Defendants, who are present here today and that letter says.

> "This is to advise you that Judge Maxwell has scheduled a hearing on *pending motions* in the above-styled civil action on December 14, 1977, at 1:30 p.m., in the U. S. Courtroom in Wheeling, West Virginia."

Now, certainly they got that notice. And Mr. Roush, of counsel for Plaintiffs, on November 2, 1977 filed a notice of appeal as to the Court's earlier actions, notwithstanding the motion at that time to reconsider.

We had understood however, from him, and perhaps this is documented in the file, that the notice of appeal was only and solely to preserve the possibility of time running against him in the event that this should be necessary.

On October the 20th, 1977, we received the Defendants' memorandum in opposition to the motion for reconsideration. In other words, the matters here had been developing all along and I don't believe it is necessary to chronicle the events too far.

The motion for reconsideration, and this is October 7, 1977, merely directs our attention to Rule 59 and asks for the reconsideration of the Court's decision to grant the Defendants summary judgment. And then they attached a memorandum of law in support of that.

On October 25, there was a motion for reconsideration filed by the same attorneys on behalf of the same Plaintiffs. And of course, it all relates back to the Court's order of October 6, 1977. And the Findings and Conclusions that the Court used to premise its order, and which narrated its reasons, was filed on September 18, 1977.

Counsel in pursuing their appeal and motion to reconsider and in their protestation of not having had notice

and time, are trying to misinterpret the Court's order of December 6th.

The order will speak for itself and is a chronology of what has happened in trying to establish an index out of the confusion of papers that have been filed here by Plaintiffs' counsel.

Also, it seems that from everything as presented by the Plaintiffs, both at our hearing of September 19, 1977, where the action was taken as memorialized by the order of October 6th, that the Plaintiffs urge that they were surprised by the summary judgment rule. It will be recalled that the Court was looking at Rule 12(b) and seems to be mandated to convert such motion, if appropriate, to a summary judgment proceedings.

It is difficult to understand how Plaintiffs' counsel can be surprised, when reference was made to an existing court record as the basis upon which the litigation was founded. I am sure that they are competent counsel and I feel reasonably sure in assuming that before bringing litigation of this nature, they would have read the testimony and record and the appelate court's decision and this Court's findings and order, so that they could not be taken by surprise.

However, be that as it may, let's look at this in a little bit more broader view and a little further view. They say they were suprised on this.

Well, the Court took its action on September 19, 1977 and we finally had an order entered, after some discussion and controversy, on October 6, 1977.

They filed immediately, well, on October the 7th was the date of the filing of the motion for reconsideration. And then again, on October 25th, they filed a motion for reconsideration. And again, all of this going back to this action and again, all premised upon the fact that they were taken by surprise.

We don't want anyone to ever be ambushed or taken by surprise. Now, we must look to the validity of their being taken by surprise or not. This is the problem that has been of grave concern to this Court.

We have to presume that they did their job and that they did their work and that they represented their clients in the accepted and traditional sense of the word.

Now, all through these proceedings they urge, at least by strong suggestion, if not in fact on the face of the matter, that if they had an opportunity to do something, they would have come forward with counter proposals that would have expanded the record and opened new vistas and suggesting liability that would go against these Defendants on the malpractice aspect of this case.

Now, we have to look at this realistically and in light of what has been done and *what is normally done instead of just what is said.*

Now, let's just ask ourselves a question here. If they were truely deprived on September 19, 1977 and didn't know that they were going to have to face anything other than the 12(b)(6) motion and notwithstanding the mandate of the last sentence, I believe of that provision. Then, what would diligent counsel normally do?

Well, it seems to this Court, this after twelve years of experience on the bench and having seen a lot of lawyers faced with comparable situations, that they would come forward with their offer of what they would have come forward with in a more timely fashion had they known about it.

We are sitting here now on December 14th, and we are talking about virtually ninety days and Plaintiff's counsel have not come forward with any Rule 56 materials; they just haven't come forward with anything.

So, the Court by this order of December 6th gave them the opportunity on the last page, after narrating all of these things to them and in the absence of the customary and usual, after thinking of a Rule 56 matter and they knew it was a Rule 56 issue on September the 19th, said to them, "Accordingly, it is ordered that Plaintiffs before December 14, 1977 at 1:30 p.m.—" and that is this day and hour—"When Plaintiff's motion for reconsideration will be heard by the Court in Wheeling, shall submit such materials as they deem appropriate for full consideration of the facts and law issues as presented and identified in the motions considered and acted upon by the Court on September 19, 1977."

Well, we did not have anything and that order, of course, went out immediately. It was on yesterday that we got the call saying that they had just received the order and they would not be able to be here and so forth. However, it was a day or two before that time—well, we have received in the office at Elkins since we left, certain documents and papers in this case that were dated and mailed a day or two before they said they first knew about it. So maybe that can be blamed on secretarial help or something of that nature. But anyway, it does not square with what they have told us.

This Noon, within the last hour or so, we have received what appears to be a rather lengthy Mailgram. And a copy of this was also sent to Elkins. By the way, the documentation that I just recently spoke of was mailed to Elkins, so we did not have the benefit of that, but apparently this is a copy of it and *it is asked that this be made q part of the record here and it will be. Everything that we have received in Elkins has been made a part of the record.*

Within the hour though in Elkins, we have received an affidavit from I. M. Molever delivered by Special Delivery Mail. And in talking with our secretary in Elkins and

reading back and forth, the Mailgram is apparently the same document that is included in this Mailgram.

So, as I say, this Mailgram will be made a part of the record also, and these other documents when we get to them, will be made a part of the record, also.

Let me take some time to read this over as we just received this.

(Whereupon, the Court does so.)

This goes on to say.

"This letter will memorialize the two telephone conversations I had with your secretary and law clerk, Pam Sargent, this morning." And this is dated 12-13 at 2:00 p.m., which is Mountain Standard Time.

"I received your order dated December 6, 1977 requesting that Plaintiffs submit affidavits and other materials in support of Plaintiffs' pending motions for reconsideration in the mail yesterday morning, December 12, 1977. Because of the fact that mail delivery between Arizona and West Virginia takes nearly three days, we were of the view that we did not have an adequate period of time in which to comply with your order; nevertheless, an affidavit was immediately prepared and sent to the Court yesterday by Special Delivery Mail. For your convenience, I am enclosing a copy of the text of the affidavit as part of this letter.

In view of the foregoing, I called your secretary this morning and requested a continuance of the hearing on Plaintiffs' Motions now set for December 14, 1977 for two reasons: (1) In order that Plaintiffs could thoroughly comply with your order of December 6, 1977 and (2) in order that someone from our firm could travel from Arizona to West Virginia in order to appear to argue the motions. Although I have contacted three other law firms in West Virginia in attempt to obtain counsel to appear on Plaintiffs' behalf tomorrow, no local counsel has been willing to make the appearance.

Your law clerk, Pam Sargent, returned my telephone request for a continuance and indicated to me that it was your position that no extension of time to comply with your order of December 6, 1977, or to arrange for an appearance by counsel for Plaintiffs at oral argument would be granted. Consequently, I must inform you that we take exception to your decision not to continue the hearing and in view of its request that the motions be decided on the basis of the written materials submitted.

I would respectively additionally request that a copy of this communication be made a part of the record on appeal to the Fourth Circuit. Sincerely—" And this is apparently signed by Mr. Roush.

Well, in the first place, there was no commandment in the order of December 6, 1977 for them to file anything. It was merely giving counsel the invitation to read the rule and to comply with the rule, if they had anything to comply with.

This does not appear to the Court to be any excuse for their failure to have done something in support of the motion for reconsideration or to respond to the Rule 56 matter, although they did have ninety days to do that.

I was only trying to, by this order, chronicle the case and to give them the opportunity that if for any reason they had overlooked the opportunity, to know that they were welcome to file anything, even right up to today.

And, of course, we do have the affidavit *by Mr. I. M. Molever, in support of the motion for reconsideration* which is attached to and made *a part of this.*

Let me just have this be made available to counsel and let you all read that and I would be glad to have any responses that you may have on the matter.

I will step out while you all look that over. (Whereupon, the Court left the bench and upon being notified by counsel they were ready to proceed, everyone returned to the court-

room and the following matters were had in open court, to-wit:)

THE COURT: All right, Gentlemen, do you have any thought after having read this exhibit?

MR. EARDLEY: If the Court please. We have compared the Mailgram with the affidavit that I received in the mail yesterday—well, not really mail, but by Federal Express, whatever that is; I don't know.

But for all practical purposes, I would say these are identical. And I would like to observe on the record that this affidavit, given by a layman, purports to draw legal conclusions more than to assert facts. And this is an attempt to bring a standard of care into the record that Mr. Molever couldn't possibly be qualified to express.

He is not a lawyer, but obviously is a very experienced litigator, but he is not trained in the law. I think that this affidavit is largely a group of legal conclusions and totally ridiculous assertions. Such things as Mr. Preiser failed to call the attention of the Court to the exhibits in the record. Well, as long as anything is in the record, one has to assume that the appellate court in its function, finds that and looks at it and considers it. I think that the record will speak for itself in the past.

This case was tried unbelieveably well. The verdict of the jury should be some measure of that. Mr. Preiser couldn't make the facts; he had to take them as he found them. And the decision of the Fourth Circuit, which we all know about, was only rendered after the Fourth Circuit had considered the entire record and a very voluminous and very good brief. And Mr. Molever is not qualified to criticize or to comment on any of those problems and that is largely what is in this affidavit.

Then when he gets through attempting to criticize everything that was done in this case, he arrives at the brilliant conclusion that he didn't have any case in the

first place, so Mr. Preiser was neglient for letting him go ahead with it, which is all incredible.

I just think this is an offense to the legal procedures and I would hate, if I were a practicing lawyer in Arizona or anywhere else, to have my name connected with such an affidavit.

Now, although I think that is not worthy of a reply, I talked to Mr. Preiser yesterday afternoon and he drafted a counter affidavit, which I have here. He disposes of most of this essay. I think that in the exercise of due care, we really ought to file Mr. Preiser's affidavit.

Now, technically I have not served this for it was just prepared about 6:00 o'clock last night.

THE COURT: Well, they should have been here. They had notice of this on October the 31st and a reasonable exercise of diligence in the practice of law and knowing what Rule 56 requires, that if you have anything to present—in light of this case and in light of their objections, they should have had these things in and be present and accounted for.

MR. EARDLEY: Well, as Mr. Underwood can tell you, they knew about this last week; there is no question about that. And they made up their minds not to come last week, not this week.

THE COURT: There is an old French Proverb, if I can recall it correctly, that says. "To accuse is to excuse." And that may have some application here.

MR. EARDLEY: Well, what I thought that I would do your Honor, is that I will serve this affidavit properly and send the original to your clerk. I will tender now, simply for your convenience, a copy of it.

THE COURT: That may be done.

MR. EARDLEY: You may have that to look at and then if you so desire, I will then serve this tomorrow and it will go the usual route and become a part of the record.

Otherwise, I don't have anything more to say about it.

MR. UNDERWOOD: Your Honor, as the record will reflect, I represent Mr. John F. Brown, Jr., in this situation. I did not as of 8:00 o'clock this morning have a copy of the affidavit of Mr. I. M. Molever in my office in Clarksburg. I learned of the existence of the affidavit at approximately 7:00 o'clock in the evening, last evening, when I spoke to Mr. Eardley by telephone. For that reason, I have not had an opportunity to prepare any response thereto in behalf of John F. Brown, Jr., the Defendant.

I would echo Mr. Eardley's evaluation of the content of the Molever affidavit. And while I do not believe that that affidavit serves to create any issue of fact or indicate the creation of any issue of fact by reason of Mr. Molever's lack of qualification to reach the ulitmate conclusion of being, whether Mr. Brown and Mr. Preiser acted in accordance with the standards for practice in this Court and in the United States Court of Appeals for the Fourth Circuit. Your Honor, I would like to have the opportunity, if I may, to prepare and to cause to be filed with this Court, and also, to be served upon Plaintiffs' counsel in Arizona, an affidavit on behalf of John F. Brown, Jr.

I would also like to state, at the invitation of Mr. Eardley, that I was advised, and this is purely upon recollection that I say this, but I was advised last week and it may have been before that time, by Mr. LaVerne Sweeney, who is local counsel for the Plaintiffs in this case, at approximately 5:10 in the evening while in my office in Clarksburg by telephone, that it was the intention of counsel for the Plaintiffs, including Mr. Sweeney, not to appear at the hearing as scheduled for this date.

At that time, it is my recollection, that I suggested to Mr. Sweeney that he advise the Court of that. By subsequent telephone call Mr. Sweeney advised me that he had spoken with the Court and that he did not know what their posture would be after that conversation.

With that I would have nothing further to say, but I would pray that on behalf of John F. Brown, Jr., the opportunity to file a response to the Molever affidavit.

THE COURT: I think it would be well to complete the record in these regards.

Miss Sargent, when did Mr. Sweeney call our office?

MISS SARGENT: It was sometime last week and we told him that the hearing was going on as scheduled.

THE COURT: What did he ask for particularly?

MISS SARGENT: A continuance, but he gave no reasons.

THE COURT: And you talked to him?

MISS SARGENT: Yes, sir.

THE COURT: And you told him that it was going on as scheduled?

MISS SARGENT: Yes, sir.

THE COURT: Then, I believe that according to the letter we have here, he did talk with you the other day about this.

Was Mr. Roush the person you talked to?

MISS SARGENT: It was Mr. Fleming with whom I spoke. I returned a phone call he had made to you, after he had then spoken with Mrs. Frey, your Secretary. He said, that they were not coming but gave no reasons therefore. He informed me that Mr. Sweeney would be out of town and again, gave no reasons therefore.

When I reported to him that it was your preference that this matter go on as scheduled, he again informed me that Plaintiffs' counsel would not be here and that they would rest on the matters already filed in evidence.

THE COURT: That was yesterday?

MISS SARGENT: Yes, sir.

THE COURT: December the 13th.

MISS SARGENT: December the 13th, 1977.

THE COURT: All right. Thank you.

Well, I don't understand this method of practicing law. I don't mean to be critical for maybe there is something about it that I don't understand. There may be situations that we do not comprehend, but it would seem to me that counsel for all parties, particularly the Plaintiffs in matters of this nature and on procedural questions of this type, have a very serious responsibility to get to the foundation issues quickly and thoroughly. And if there is something of a problem arising out of the base litigation then the responsibility is not to paper the narrative to death, but to point out precisely and exactly what the problem is.

If for any reason the Court was not mandated by Rule 12(b) to transform the 12(b)(6) motion to a summary judgment motion. We have had time after the fact for the Plaintiffs to come forward and to demonstrate to the Court that the Court acted improvidently and they obviously knew that they had that right because the day after the order was entered, some days after the action was entered, motions for reconsideration were filed and then later on, refiled. And they claimed that they only needed to have the opportunity to present a showing.

Well, we waited and we waited and then on December the 6th, the Court expressly invited them to file, even as

late as the hour of this hearing, and yet they backed away and wouldn't even come to Court today.

So, we don't know exactly what the problem is and we will not try to identify it further. We will just try to handle the issues as best we can. After all, the Defendants have certain rights, too.

It costs a lot of money to have counsel travel here and there, doing research and all of these types of things. And it seems to me that the Court has a responsibility not just to call balls and strikes, but to manage and to administer cases.

If we cannot get the cooperation of counsel from counsel for the plaintiffs or for defendants, then the Court has the responsibility to do that which is available to it and which accomplishes substantial justice as best can be done.

So we have given the Plaintiffs, it is believed, every opportunity to come forward and to try and develop their case. And they have failed to do so for reasons that are best known to themselves.

I don't understand Arizona counsel attempting to obtain local counsel at this late date when they already have local counsel. I don't understand that either.

So the Court has independently looked into this matter further and frankly, if there is any way that the Plaintiffs case could go to a jury, then this Court's philosophy is that it should. We deserve to have the best of the composite judgment of the jury, but as we look to this case and as we see the action as taken in the base litigation, we see the very thorough opinion on all of the issues in the Circuit Court of Appeals, *and we see the complete birth of ideas or suggestions as to the liability that has been raised here on the various pleadings in this* matter. Then indeed, the Plaintiffs' case here just fails; just fails terribly.

So, the Plaintiffs' motion then for reconsideration will be denied.

Also, the Plaintiffs have objected to the form of the judgment that was filed on October the 17th and that will be denied. And their motion for reconsideration of October the 25th, will be denied.

We also have pending the motion of the Defendants Brown and Preiser to strike the counter claim of Plaintiffs. That was filed with the reply to Defendant Preiser's counter claim. And it appears that these counter claims on counter claims are nothing more than a reassertion of matters, although poorly pled, a reassertion of that which the Court has already ruled upon and since the Plaintiffs' counsel have apparently not desired to pursue those matters either, those matters to strike will be granted.

Now, that should clean up everything that is now preliminary to the development of this case.

We have issues that are now ready to be developed and ready for development. Would 60 days be adequate for counsel for all parties to conclude discovery?

MR. UNDERWOOD: Your Honor, you find Mr. Eardley, Mr. Gray and myself in a peculiar position upon that matter, since we are retained for the purpose of strictly defense.

THE COURT: Of course, now I think your position is that of Plaintiffs, isn't it?

MR. UNDERWOOD: Yes. Essentially we are now Plaintiffs. It is my understanding and this is subject to correction, but I believe that Mr. Presier will now be handling the counter-claim as effective Plaintiff and that Mr. Brown will either handle his himself, or perhaps retain Mr. Preiser to do so for him.

So I would be hesitant to respond to the Court's question as to the 60 days without consultation with Mr. Preiser and Mr. Brown.

THE COURT: Well, let's do it this way. In our order of today we will provide that all discovery for all parties will be concluded and a thorough, complete pretrial order submitted say in 60 days on the issues that remain in the case.

Let's see, February the 14th—let me check that to be sure. All right, so that will be on the 14th of February, which is on a Tuesday.

We will then schedule the remaining matters for a trail at an earlier time after that.

Now, I have in Elkins—in your order, we will file the Mailgram that we have recievied here and in Elkins. We also have the affidavit of I. M. Molever, that was received this Noon in Elkins. Presumably this is the one that Mr. Eardley received yesterday.

MR. EARDLEY: Yes, your Honor.

THE COURT: So that would be the affidavit of December the 12th, 1977. And then, of course, we will file the affidavit of Mr. Presider, also.

Do you wish to have this Molever affidavit back?

MR. UNDERWOOD: If it please your Honor, for that is the only copy that I have at the present time.

Well, I don't believe there is anything more that we need to do here, except to develop this case on for further proceedings.

MR. UNDERWOOD: Your Honor, may the order also reflect the—what will occur insofar as Mr. Brown is concerned, the tendering and filing and service of an affidavit?

THE COURT: Yes, sir. That may be done.

I would really look to that not so much as to support the Court's action, but just completing our record and showing exactly what has occurred up to this time and that which we have talked about here today.

All right. There being nothing further then, we will stand in recess at this time.

(Whereupon, this concluded this matter at this time.)

Respondents' Appendix C

ORDER

On the 14th day of December, 1977, came the defendant Stanley E. Preiser, by Edward W. Eardley, his attorney, and the defendant John F. Brown, Jr., by Herbert G. Underwood and James D. Gray, his attorneys, there being no appearance of the plaintiffs either in person or by counsel, pursuant to the following:

1. Plaintiffs' Motions for Reconsideration of the entry of an order by this Court on October 6, 1977, said motions being filed on October 7, 1977, and October 25, 1977, respectively;

2. Plaintiffs' objections to form of judgment;

3. Defendants' motions to strike those pleadings of plaintiffs designated as "Counterclaims to Defendant Stanley E. Preiser's Counterclaim";

said motions having been set for hearing on the aforesaid date with due notice thereof having been provided to counsel for all parties.

Whereupon, in response to the opportunity provided by the Court for the submission by the plaintiffs of any materials customarily and usually considered on issues raised on a Rule 56 summary judgment motion which plaintiffs may not have had an opportunity to present at the September 19, 1977, hearing on defendants' motions to dismiss, the following were presented:

1. A mailgram informing the Court of the existence of an affidavit of plaintiff I. M. Molever and setting forth the contents thereof.

2. The affidavit of plaintiff I. M. Molever itself as reflected in said mailgram;

3. An affidavit of defendant Stanley E. Preiser in response to the affidavit of plaintiff I. M. Molever; all of

which are hereby ORDERED filed and made a part of the record herein, saving unto defendant John F. Brown, Jr., the opportunity to file an affidavit in response thereto.

In addition, the Court has been informed that there has been filed in the Elkins, West Virginia, office of the Clerk of this Court an affidavit executed by I. M. Molever, one of the plaintiffs herein, which affidavit is substantially identical to the recitation thereof contained in the aforementioned mailgram.

Whereupon, after due consideration of the aforesaid documents, together with the argument and briefs of counsel and other pertinent facts and circumstances, the Court is of the opinion that no genuine issue as to any material fact exists, and no inference giving rise thereto has been presented which would provide any basis or justification for a reconsideration of the entry of the Court's previous order on October 6, 1977; and further, that no additional reason or basis has been shown for reconsideration thereof.

Accordingly, it is hereby ORDERED that plaintiffs' Motions for Reconsideration, together with plaintiffs' Objections to Form of Judgment are hereby denied; and further, that defendants' motions to strike the plaintiffs' counterclaims to defendant Stanley E. Preiser's counterclaim are hereby granted.

It is further ORDERED that the opinion of this Court rendered on the 14th day of December, 1977, be transcribed and made a part of the record in this case and shall constitute this Court's findings of fact and conclusions of law.

It is further ORDERED that all discovery procedures with respect to the defendants' counterclaims shall be completed by February 14, 1978, and that a thorough pretrail order shall be prepared and filed on or before said date.

Enter: _____

_____

UNITED STATES DISTRICT JUDGE

ORDER

Among a series of motions filed by Plaintiffs in the above styled civil action, dated December 29, 1977, to which responses dated January 5, 1978 have been made by defendants, the Court finds that Plaintiffs seek a stay of further proceedings herein until the present state and status of the above styled civil action can be presented to the United States Court of Appeals for the Fourth Circuit upon Plaintiffs Notice of Appeal. To this particular motion the defendants have responded with defendant John F. Brown, Jr., moving that further proceedings, with regard to his counterclaim, be stayed until the determination of issues presently pending in this civil action before the United States Court of Appeals for the Fourth Circuit have been resolved. The Defendants, as counterclaimants, in their "Memorandum in accordance with Local Rule 2.07" do not object to plaintiffs Motion for a stay of further proceedings with regard to the counterclaim of Stanley Preiser until resolution of the issues presented by the appeal", and in addition, state "it is obviously appropriate, that the motion of the counterclaimant John F. Brown, Jr., likewise for a stay, should be granted.".

The consideration of these motions to stay proceedings becomes important and urgent since depositions are scheduled on Tuesday, January 10, 1978.

Upon consideration of all matters presented, it is ORDERED that all further proceedings in this Court, including the pursuit of discovery incidental to issues of fact and law